Supreme Court, U.S.
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No. 06- 06-364

IN THE

Supreme Court of the United States

THE DELAWARE NATION,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner, the Delaware Nation (the "Delawares" or "Petitioner"), has asserted the following alternative theories to recover tribal land: (1) Unextinguished fee-based land title subject to the protection of the Indian Non-Intercourse Act of 1799; (2) Unextinguished aboriginal land rights because there was no extinquishment of rights by a sovereign.

The Delawares' fee title/Non-Intercourse Act argument raises an unsettled and very significant legal issue which the Third Circuit Court of Appeals wrongly declined to decide. Further, the Court of Appeals' disposition of the Delawares' aboriginal rights/sovereignty argument was based on an improper finding of waiver, which was made in contravention of federal law and the policy of protecting Indian tribes from being unfairly dispossessed of their land.

The questions presented are:

(1) Whether the Indian Non-Intercourse Act of 1799 applies to land held in fee by a federally recognized Indian tribe.

(2) Whether the Court of Appeals' finding of waiver as to Petitioner's aboriginal rights claim was improper and in contravention of important rules of pleading and of federal law and policy which protect federally recognized Indian tribes asserting claims to tribal land.

PARTIES TO THE PROCEEDINGS

Petitioner, The Delaware Nation, is a federally recognized Indian tribe which sues in its own capacity and as the sole legitimate heir of, and successor in interest to, Chief "Moses" Tunda Tatamy[1]

Respondents are Honorable Edward G. Rendell, Governor of the Commonwealth of Pennsylvania; County of Northampton, Pennsylvania; Northampton County Commissioners J. Michael Dowd, Ron Angle, Michael F. Corriere, Mary Ensslin, Margaret Ferraro, Wayne A. Grube, Ann McHale, Timothy B. Merwarth, and Nick R. Sabatine; Township of Forks, Pennsylvania; Forks Township Supervisors John Ackerman, David Kolb, Donald H. Miller, David W. Hoff, and Henning Holmgaard; Binney & Smith, Inc.; Follett Corporation; Robert Aerni; Mary Ann Aerni; Audrey Bauman; Daniel O. Lichtenwalner; Joan B. Lichtenwalner; Carol A. Migliaccio; Joseph M. Padula; Mary L. Padula; Jack Reese; Jean Reese; Elmore H. Reiss; Dorothy Reiss; Gail N. Roberts; Carl W. Roberts; Warren F. Werkheiser; Ada A. Werkheiser; Warren Neill Werkheiser; Nick Zawarski and Sons Developers, Inc.; Mark Sampson; Cathy Sampson; all either current occupants of the land at issue or government entities that have sanctioned the tenants' possession.[2]

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1. Chief Tatamy's name is also sometimes spelled "Tetamy."

2. The Delawares' Complaint also named the Commonwealth of Pennsylvania, the County of Bucks, Pennsylvania and its officers Michael G. Fitzpatrick, Charles H. Martin and Sandra A. Miller as defendants. The parties subsequently stipulated to the dismissal of those parties.

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PETITION FOR WRIT OF CERTIORARI

The Delaware Nation, a federally recognized Indian tribe, acting on its own behalf and as the legitimate sole heir of, and successor in interest to Chief "Moses" Tunda Tatamy, respectfully petitions for a writ of certiorari to review the judgment rendered in this case by the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The May 4, 2006 opinion of the United States Court of Appeals for the Third Circuit (App. 1a-17a) is reported at 446 F.3d 410 (2nd Cir. 2006). That published version of the opinion incorporates the terms of the Court of Appeals' subsequent June 14, 2006 Order, whereby the court amended its May 4, 2006, opinion to correct a statutory reference. (App. 18a-20a). The November 30, 2004 opinion of the district court, which granted respondents' motions for dismissal filed pursuant to rule 12(b)(6) of the Federal Rules of Civil Procedure (App. 21a-50a), is unreported.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on May 4, 2006. A timely petition for rehearing *en banc*, or alternatively for panel rehearing, was denied on June 15, 2006 (App. 51a-53a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Indian Non-Intercourse Act, 25 U.S.C. § 177 (1799), provides:

> [N]o purchase, grant, lease or other convevance of lands or title or claim thereto, from any Indian, or nation or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or in equity, unless the same be made by treaty or convention, entered into, pursuant to the constitution.

The Protection of Indians Act, 25 U.S.C. § 194, (2003), provides:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person whenever the Indian shall make out a presumption of title in himself from the fact of previous ownership or possession.

RULE INVOLVED

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following

> defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted,. . . .

STATEMENT OF THE CASE

This case involves the Delawares' efforts, undertaken pursuant to federal statutory and common law, to regain possession of approximately 315 acres of tribal land. The Delawares' right to the land at issue arises from two sources: (1) Unextinguished fee title based on two land patents from the Proprietaries of colonial Pennsylvania to one of their chiefs (as to whom Delaware Nation is the sole legitimate heir and successor in interest); (2) Unextinguished aboriginal title, having occupied the land from time immemorial.

The Court of Appeals' decision affirming the dismissal of the Delawares' Complaint contravened federal statutory, procedural and common law and was in derogation of various important policy considerations. That court explained that the question of whether the Indian Non-Intercourse Act protects tribal or Indian land acquired in fee "appears to be unsettled." (App. 13a-14a). However, it declined to consider and address this issue, thereby leaving unresolved an important part of the Delawares' claims, which claim is of great importance to all Native Americans.

The Court of Appeals also departed from federal law and policy in finding that the Delawares waived their right to contest a key factual conclusion reached by the district court in connection with its Rule 12(b)(6) dismissal. That conclusion, to the effect that Thomas Penn was the sovereign, contradicted both the Complaint's allegations and the plain

language of one of its attachments. Contrary to the Court of Appeals' conclusion, the record establishes that the Delawares repeatedly objected to defendants' insertion of various extraneous facts, such as the purported "fact" upon which the district court ultimately relied. The Delawares did not waive their claim that their aboriginal title was never properly extinguished by a sovereign. That claim of non-extinguishment was entitled to substantive review.

A. Factual and Procedural Background[3]

1. Facts Alleged In Complaint

The Delawares are a federally recognized Indian tribe and the political continuation of the Lenni Lenape tribe of Indians. 67 Fed. Reg. 46328 (2002). They commenced this action on their own behalf and as the sole legitimate heir of and successor in interest to "Moses" Tunda Tatamy, a deceased Lenni Lenape chief. Approximately 315 acres of land in eastern Pennsylvania, now known as Tatamy's Place, is at issue. Their claim of entitlement to that land was thwarted at the district court level by its dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

From time immemorial and prior to the arrival of European settlers, the Delawares inhabited large portions of the eastern seaboard of the North American continent. The homeland of the Delawares extended throughout the Delaware River Valley from what is now Cape Henlopen, Delaware (to the south), to include the west side of the lower Hudson Valley in what is now Southern New York State (to

3. Except as otherwise noted, the factual background is based upon the allegations in the Complaint.

the North). It included Tatamy's Place, the approximately 315 acres located at the "Forks of the Delaware," Forks Township, Northampton County, Pennsylvania, which are now at issue. By virtue of their continual occupancy and possession of that land, the Delawares maintain aboriginal rights to the property.

When the European settlers came to North America, they brought with them the concept of fee ownership of land.[4] In 1681 King Charles II of England signed a charter in favor of William Penn for lands encompassing what is today the Commonwealth of Pennsylvania. Although William Penn owned fee title and was the proprietary of colonial Pennsylvania by virtue of the Charter, he was nonetheless "accountable directly to the King of England." The Charter, which conveyed Pennsylvania to William Penn (and was attached to the Complaint), stated that the Crown is "Saving also, unto Us, Our heires and Successors, the Sovereignty of the aforesaid Countrey."

After the death of William Penn and his wife, Penn's sons and grandsons became the "Proprietaries" of colonial Pennsylvania. They did not exhibit the same friendly attitude toward the Indians as did their father. William Penn's son, Thomas Penn, employed particularly deceitful tactics in dealing with the Indians. Through his infamous act of chicanery, known as the Walking Purchase of 1737, Thomas

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4. Fee title is also referred to in the case law as the right of preemption. *The Seneca Nation of Indians v. State of New York*, 206 F. Supp. 2d 448, 504 (W.D.N.Y.) (citing *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 574 (1823) (cites omitted), *aff'd*, 382 F.3d 245 (2d Cir. 2004), *cert. denied*, __ U.S. __, 126 S. Ct. 2351, 165 L. Ed. 2d 278 (2006). The right of preemption gives the holder the exclusive right to acquire Indian land once aboriginal title is extinguished. *Id.*

Penn dispossessed the petitioner Delawares of 1,200 square miles of land.[5]

Although the Walking Purchase had the effect of dispossessing the Delawares from 1,200 square miles of land, neither Thomas Penn nor the other Proprietaries of colonial Pennsylvania had the intent to dispossess Petitioner from Tatamy's Place. Rather, the Delawares' possessory rights were reaffirmed through the fee title conveyance of Tatamy's Place from the Proprietaries to Chief "Moses" Tunda Tatamy, a leader of the Delawares who lived on the land with his band of Delaware Indians.

The first official documents evidencing the Proprietaries' intent to convey Tatamy's Place to the Chief predates the 1737 Walking Purchase. On December 13, 1736, a Warrant — *i.e.*, an official application to the colonial government for land — submitted by the Lenni Lenape and issued by the Proprietaries was duly recorded in the Warrant Application Books of Bucks County at T-14 (the "Warrant"). On April 28, 1738, the Proprietaries granted Chief Tatamy a land patent to the 315 acres now known as Tatamy's Place (the "First Patent"). The Proprietaries' grant of Tatamy's Place to Chief Tatamy was again confirmed after the Walking Purchase through the issuance of a second land Patent on January 22,

5. Thomas Penn misrepresented to tribal leaders that their ancestors agreed to relinquish their rights to as much land as could be walked in a day. Thomas Penn's representations are now universally recognized as having been fraudulent. At the time, however, tribal leaders believed Thomas Penn's statements to be true and felt duty bound to honor the alleged agreement. Thomas Penn exacerbated his fraud by pre-cutting a way through the forest and employing trained runners (instead of walkers) to take as much tribal land as possible.

1741 (the "Second Patent"), duly recorded in Patent Book A-9, Page 530.

The Delawares attached true and correct copies of the First and Second Patents to their Complaint. They also averred that Chief Tatamy received fee title to Tatamy's Place in his capacity as a tribal representative by virtue of the fact that the Delawares did not recognize individual land ownership. Like many other Indian tribes, they believed in the communal ownership of property. Further, they alleged in their Complaint that they are, in any event, the sole legitimate heirs of, and successors in interest to, Chief Tatamy.

Neither Chief Tatamy nor the Delawares ever subsequently conveyed fee title to Tatamy's Place to anyone. Specific averments to this effect are found in ¶¶ 45, 47, 48 and 55 of their Complaint. After the Second Patent, the next record conveyance pertaining to Tatamy's Place is a deed recorded on March 12, 1803. In that deed, Edward Shipper, as the Executor of the Estate of William Allen, purported to convey Tatamy's Place to Henry and Mathias Strecher (the "Strecher Deed"). The Strecher Deed is recorded in the Office of the Recorder of Deeds in Deed Book 2, page 242. There exists no prior deed from Chief Tatamy or any of his heirs to William Allen or to any other person.

2. The Delawares' Claims Asserted In Complaint

The Delawares, on their own behalf and as the heir of Chief Tatamy, commenced suit in the United States District court for the Eastern District of Pennsylvania to regain their

315 acres of tribal land.[6] Their Complaint asserted both fee-based and aboriginal rights to this land. The fee-based claim was brought under the Indian Non-Intercourse Act of 1799, 25 U.S.C. § 177 (1799). Their aboriginal land rights claim relied on the Non-Intercourse Act of 1799 and on federal common law. *E.g.*, *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 234-35 (1985) (recognizing common law cause of action of Indians to sue for aboriginal land rights).

3. Defendants' Motions To Dismiss

The defendants each moved to dismiss, arguing, among other things, that the Delawares failed to state legally recognized claims. In pertinent part, they challenged the applicability of the Non-Intercourse Act to the Delawares' fee title claim and maintained that the Delawares' aboriginal title was long ago extinguished. They also raised factual issues by interjecting extraneous allegations of historical facts into their arguments, and refused to accept the Complaint's allegations as true, as required by Rule 12(b)(6).

A key extraneous factual contention which defendants interjected into the case was that William Penn and his heirs (including Thomas Penn), not the King of England, were the sovereigns of colonial Pennsylvania at important times referred to in the Complaint. *See, e.g.*, Governor Rendell's Memorandum of Law in support of his Motion to Dismiss

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6. The Delawares' suit was against the individuals and businesses currently occupying Tatamy's Place, together with the local, county and state governments which approved and ratified the possession of the land. It sought declaratory and injunctive relief to restore their possession of Tatamy's Place, and damages for the unlawful occupancy of that land.

at 3, 13-14. The issue of sovereignty had great potential significance because only the sovereign is vested with the right to extinguish aboriginal title (*i.e.*, holds the "right of extinguishment"). Contrary to the complaint's allegations, the defendants argued that the Delawares' aboriginal rights were extinguished by the Proprietaries as sovereign.

The Delawares' written response objected to defendants' improper attempts to inject facts outside the record. Specifically, the Delawares stated:

> Defendants disregard the allegations contained in the Complaint and the fair inferences drawn from those allegations and instead improperly interject inconsistent *facts* to urge the Court to draw contrary conclusions. In addition to having no bearing on a motion to dismiss, those facts simply are inaccurate and unverified.

See Consolidated Memorandum of Law in Opposition and Response to All Defendants' Motions to Dismiss at 13 (emphasis on original). Later, in responding to written questions provided to the parties by the district court at oral argument, the Delawares repeatedly stated their objection to the district court's consideration of any facts that were contrary to the Complaint's allegations.

B. The District Court's Decision

Unlike subsequent statutory versions, the 1799 and 1802 versions of the Non-Intercourse Act of 1799 governed the divestiture "of lands, or of any title or claim thereto, *from any Indian*, or nation or tribe of Indians . . .," (emphasis

added).[7] Thus, it specifically spoke to individual Indian land possession.

The district court ruled that the 1802 version of the statute, extending protection to lands owned by individual Indians as well as Indian nations and Indian tribes, applied to the Delawares' claims. App. 42a.[8] However, it rejected the applicability of that statute to their fee-based claims under the theory that "whatever title Plaintiff [petitioner] asserts to have, the title must have aboriginal rights attached in order to survive dismissal under the [Non-Intercourse] Act and federal common law." App. 43a. Thus, the District court rejected the Delawares' argument that a Non-Intercourse Act claim could be based on fee title to tribal land. App. 42a-43a.

The district court also wrongly construed the Delawares as arguing that once extinguished, aboriginal title could be revived by the tribe's receipt of fee title. App. 43a [p.27 of D.Ct.'s opinion) The District court concluded, based on New York district court authority, that "aboriginal title, once extinguished, is forever lost." App. 44a, citing *Tuscarora Nation of Indians v. Power Authority of New York*,

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7. Later statutory language, including the language initially relied upon by the Third Circuit Court of Appeals before correcting its opinion, spoke to "lands, or of any title or claim thereto, *from any Indian nation or tribe of Indians*" (emphasis added). *See also* the June 14, 2006 Third Circuit Court of Appeals Order at App. 19a.

8. The district court applied the 1802 version of the statute because the first recorded deed transfer, after the second land Patent was issued in 1741, occurred in March, 1803. App. 42a. With respect to the issues presented in that case, there are no material differences between the 1799 and 1802 versions of the statute.

164 F. Supp. 107 (W.D. N.Y. 1958). It also rejected the Delawares' argument that the Tenth Circuit's decision in *Alonzo v. United States,* 249 F.2d 189, 197 (10th Cir. 1957), *cert. denied,* 355 U.S. 940 (1958), supported the conclusion that the Non-Intercourse Act protected fee title as well as aboriginal title. App. 44a, n.6.

Because the district court ruled that the Non-Intercourse Act did not protect fee title, it did not analyze whether the Delawares obtained fee title to Tatamy's place either because the conveyance was to Chief Tatamy as an tribal representative, or because of the Delawares' asserted position as the sole legitimate heir of, and successor in interest to, Chief Tatamy.

Besides rejecting the Delawares' fee-based title argument, the district court also rejected their aboriginal title claim. App. 39a-40a. The Court premised that portion of its decision on a factual conclusion, at variance with the pleadings, that Thomas Penn was the sovereign of colonial Pennsylvania and was thus empowered to extinguish Indian rights. As previously noted, this factual contention not only contravened the Complaint's allegations, but also was objected to by the Delawares during the course of the district court litigation of the Rule 12(b)(6) motions.

C. The Court of Appeals' Decision

On appeal, the Third Circuit Court of Appeals affirmed the district court dismissal, finding (1) that any aboriginal rights were extinguished by the Walking Purchase, and (2) that the tribe does not hold fee title to the land. In so doing, the Court of Appeals recognized the unsettled nature of the

question of whether the Non-Intercourse Act applies to Indian land held in fee. App. 11a-14a. However, it refused to consider and resolve that potentially significant Indian affairs issue.[9] Its justification therefore, according to the panel, was that the conveyances in the First and Second Patents were to Chief Tatamy as an individual, and not as a tribal representative. App. 13a-14a.[10]

The Court of Appeals' analysis and stated justification resolved only one prong of the Delawares' two prong fee-based land claim. Besides alleging that Chief Tatamy received title to Tatamy's Place as a tribal representative (which the Third Circuit rejected), the Delawares also alleged entitlement to the land by virtue of their position as sole and legitimate heir of, and successor in interest to, Chief Tatamy.[11]

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9. The Court of Appeals also did not cite the correct version of this statute in rendering its opinion on May 4, 2006. It corrected its error on June 14, 2006. App. 19a-20a.

10. At n.15 of its Opinion the Court of Appeals further noted:

> In addition, Judge Roth would hold that the Nonintercourse Act claim would fail even had the land in question been tribal because the Delaware Nation failed to identify a specific land conveyance that violated the Act or to allege that the gap in the chain of title post-dates the Nonintercourse Act's enactment.

App. 17a.

11. The Delawares' alternative theories were concisely stated in the Complaint and set forth in the response to the district court's written questions. They reminded the Court of Appeals of this point in their principal appellate brief at p.32 (arguing that the Nation "is

(Cont'd)

The Court of Appeals clearly should have determined whether the Delawares stated a viable Non-Intercourse Act claim by reason of the assertion of their position as the Chief's sole legitimate heir and successor in interest. The Court of Appeals decision, as amended on June 14, 2006, recognized the applicability of the version of the Non-Intercourse Act that protected land rights of individual Indians. However, that court never at any point reached the considerably important and unsettled question of whether the Non-Intercourse Act protected Indian lands held in fee.

The Court of Appeals also refused to review the district court's factual finding that Thomas Penn was the sovereign of colonial Pennsylvania — sovereignty being the predicate for a right of extinguishment. Instead, it ruled that the Delawares waived their right to contest Thomas Penn's alleged sovereign status and thus refused to consider the merits of the Delawares' alternative argument for aboriginal land rights. The Court of Appeals imposed the severe sanction of waiver against the Delawares despite its recognition that "The history of Tatamy's Place is yet another sad example of our forefathers' interactions with the Indian nations." App. 3a. In fact, the Court of Appeals' imposition of such a sanction was perhaps yet another "sad example" of Indian treatment. Remarkably, it was imposed although the Delawares had contested defendants' interjection of facts from outside of the Complaint and its attachments —

(Cont'd)

the legitimate heir of Chief Tatamy and the political continuation of the Lenni Lenape tribe" and "alternatively took the fee title as the heir of Chief Tatamy"), and reiterated this argument in their reply brief at § II.C.3 ("The Delaware Nation is the Rightful Heir of Chief Tatamy").

including defendants' factual contention that the Proprietaries (and not the King of England) were sovereigns and therefore entitled to extinguish aboriginal rights.

The consequence of the Court of Appeals' waiver ruling was to allow the district court's clearly erroneous factual conclusion, based on unverified facts contrary to the Complaint's allegations, to remain unchallenged. This, in turn, deprived the Delawares of both protections to which it is absolutely entitled and of access to the courts to litigate its aboriginal rights claim.

REASONS FOR GRANTING THE PETITION

The Delaware Nation petitions this Court pursuant to Sup. Ct. R. 10 for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit.

Review is first warranted because the Court of Appeals failed to address and resolve what it recognized to be an unsettled question of federal law: Whether the Non-Intercourse Act applies to land held or acquired by Indian tribes in fee. *See* App. 13a-14a. The lower court's failure to review that key issue, and to then resolve the Delawares' related fee-title claim based on its status as Chief Tatamy's successor in interest and only legitimate heir, is more than disappointing. Resolution of these issues is so important for the proper conduct of Indian affairs that it warrants the exercise of this Court's supervisory powers. Sup. Ct. R. 10(a).

Review is also warranted because the Court of Appeals' ruling, that the Delawares waived their right to contest a critical district court factual conclusion, was contrary to their Complaint's allegations, contravenes federal Indian law and

policy, as well as settled federal procedural law, and was not supported by the record. Such a severe departure from federal Indian law and policy, and from the Federal Rules of Civil Procedure, likewise calls for the exercise of this Court's supervisory powers. Sup. Ct. R. 10(a). Significantly, where Indian affairs are at issue this Court has found it appropriate to exercise its jurisdiction although the determination at issue might not otherwise be subjected to review. *See Williams v. Lee*, 358 U.S. 217, 218 (1958) ("Because this *was a doubtful determination*, of the important question of state power over Indian affairs, we granted certiorari." (emphasis added)).

I. This Court Should Review And Resolve The Unsettled Issue Of Whether The Non-Intercourse Act Protects Indian Land Held In Fee

In affirming the district court's dismissal of the Delawares' Complaint, the Court of Appeals recognized the existence of an unsettled question of federal law: Whether the Non-Intercourse Act applies to tribal land reacquired or held in fee title. It is desirable that this significant issue be resolved. Such resolution depends on an analysis and review of federal Indian law and policy.

Federally recognized Indian tribes such as the Delawares are "wards of the nation, and dependent wholly upon its protection and good faith." *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 354 (1941) (*citing Minnesota v. Hitchcock*, 185 U.S. 373, 395, 396 (1902). Accordingly, federal courts and Congress have been particularly protective of the land rights of Indians.

Federal policy must be the starting point to determine whether the Non-Intercourse Act extends to Indian land held

in fee. It is well recognized that "[f]ederal law has generally protected beneficial use by tribes of their lands, regardless of how acquired." F. Cohen, *Cohen's Handbook of Federal Indian Law*, § 9.A (1982) (Tribal Interests in Real Property). The Non-Intercourse Act does not alter federal policy.

The express statutory language of the instantly relevant Non-Intercourse Act applies to "purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation or, tribe of Indians . . ." 25 U.S.C. § 177 (1799). *See also* App. 20a (June 14, 2005 Court of Appeals Order correcting this statutory reference). Such broad language does not limit the statute's application solely to aboriginal title to tribal land. Rather, the broad reference to "any title or claim" to land owned by Indians supports the conclusion that valid claims under the Non-Intercourse Act include those based on fee title to tribal land. Indeed, federal courts have not required that a plaintiff to plead aboriginal title to state a Non-Intercourse Act claim. Rather, a plaintiff need only plead that: (1) it is an Indian or an Indian tribe; (2) the land in question is tribal land; (3) the United States never consented to or approved of the alienation of the land in question; and (4) the trust relationship between the United States and the tribe has not been terminated or abandoned. *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 56 (2d Cir. 1994) (*citations omitted*).

This case presents this Court with the opportunity to definitively review and define this area of the law, and to make clear that the Non-Intercourse Act's alienation restrictions are not limited to aboriginal title. The Court can resolve this important "unsettled" area of the law.

Such an articulation by this Court would be appropriate. Consistent with federal policy, the plain language of the statute, and the Delawares' asserted position, circuits other than the Third Circuit have interpreted the Non-Intercourse Act's alienation restrictions to be broader than just aboriginal title. In *Alonzo v. United States*, 249 F.2d 189, 196 (10th Cir. 1957), *cert. denied*, 355 U.S. 940 (1958), the Tenth Circuit specifically stated:

> The reason for the imposition of restrictions [set forth in 28 U.S.C. § 177] *is in nowise related to the manner in which Indians acquired their lands.* The purpose of the restrictions is to protect the Indians . . . against the loss of their lands by improvident disposition or through overreaching by members of other races.

Alonzo, 249 F.2d at 196 (emphasis added). This holding recognizes the strong federal policy of federally recognized Indian tribes who are considered wards of the federal government.

The Fourth Circuit decision in *United States v. 7,405.3 Acres of Land*, 97 F.2d 417, 422 (4th Cir. 1938), is consistent with the *Alonzo* holding. There, the Commissioner of Indian Affairs acquired land for the benefit of the Eastern Band of Cherokees via a grant from the State of North Carolina. *7,405.3 Acres of Land*, 97 F.2d at 418-19. The Fourth Circuit specifically held that the Non-Intercourse Act's restrictions on alienation apply, stating that "*it makes no difference that title to the land in controversy was originally obtained by grant from the state of North Carolina.*" *Id.* at 422 (emphasis

added). The "determinative factor" in the Fourth Circuit's holding is

> that the federal government has assumed toward [the Eastern Band of Cherokees] the same sort of guardianship that it exercises over other tribes of Indians, from which it results that their property becomes an instrumentality of that government for the accomplishment of a proper governmental purpose and may not be taken from them by contract, adverse possession, or otherwise without its consent.

Id. (citations omitted).[12]

Logic, public policy and existing case law establish that the version of the Non-Intercourse Act, which the Court of Appeals ultimately found to apply to this case, protects land owned in fee by individual Indians. *See* 25 U.S.C. § 177 (1799). The plain language of the Non-Intercourse Act does not require plaintiff Indians or tribes to have aboriginal title to tribal land. Thus, the Court of Appeals' ruling that Chief

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12. The United States District Court for the Northern District of New York also extended federal land protections to Indian land held in fee title in interpreting the term "Indian Country" (which term refers to the geographic area in which tribal and federal laws normally apply and state law does not. 18 U.S.C. § 1151(a)). Specifically, in *Cayuga Indian Nation v. Village of Union Springs*, the court held that the property at issue "falls within the definition of Indian Country, and such status is not precluded when a tribe holds fee title to the land." 317 F. Supp. 2d 128, 137 (N.D.N.Y. 2004). Only Congress could terminate the reservation status of the land. *Id.* Because the land was "Indian Country," local zoning laws did not apply.

Tatamy took fee title to Tatamy's Place as an individual and not as a tribal representative did not resolve all aspects of the Delawares' claims. Correction is required to protect Indian rights.

The Delawares alternatively alleged in their Complaint, and argued throughout each stage of this litigation, that they have fee-based rights because they are Chief Tatamy's heirs and successor in interest. Courts have the obligation to consider alternative arguments, and the Third Circuit should have done so here. *See, e.g.*, *Edwards v. Wyatt*, 335 F.3d 261, 263 (2nd Cir. 2003) (finding district court improperly failed to consider or resolve plaintiff's alternative claim and remanding for consideration).

Regardless, and in any event, for purposes of defendants' motions to dismiss made pursuant to Rule 12(b)(6), the pleadings must be accepted as true. *E.g.*, *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (2nd Cir. 1993). This is particularly so here since the right of inheritance of Indians is controlled by the laws, usage and custom of the tribe. *Jones v. Meehan*, 175 U.S. 1, 30-32 (1899). Finally, the Delawares' status as Chief Tatamy's heirs is a factual matter, which should not have been resolved in a dismissal motion.

In sum, when the Non-Intercourse Act applies, the only way that tribal land can be defeased is through a federal treaty approved by the Congress of the United States. 25 U.S.C. § 177 (1799). The Delawares' Complaint avers that no such defeasance occurred with respect to its fee title in Tatamy's Place. Hence, their claim should have been allowed to proceed and the Court of Appeals should therefore have reversed the district court's dismissal.

II. The Court Of Appeals Contravened Federal Indian Law And Policy When It Found Waiver and Failed To Review The District Court's Erroneous Factual Conclusion, Which Was Contrary To The Complaint's Allegations

This Court should also exercise its supervisory powers to review the Court of Appeals' conclusion that the Delawares waived their right to contest the district court's factual conclusion that Thomas Penn was sovereign, and therefore vested with the right to extinguish the Delawares' aboriginal land rights. That conclusion violated the Indian Protection Act, 25 U.S.C. § 194 (2003), and Rule 12(b)(6) of the Federal Rules of Civil Procedure. Its force and effect was to deny the Delawares their coveted access to the courts to pursue their non-extinguishment claim.

As a preliminary matter, the Court of Appeals' waiver conclusion is factually incorrect. As previously detailed, *defendants raised Thomas Penn's alleged sovereign status as a factual issue, not a legal issue.* Governor Rendell (and other defendants) inserted that and numerous other extraneous facts into the brief in support of his dismissal motion and then predicated his legal argument on those facts. In response to their brief, the Delawares specifically objected to defendants' interjection of extraneous facts and otherwise sufficiently preserved this issue for later review. *See* discussion *supra* (Statement of Case, Section A.3.).

In nevertheless finding waiver, the Court of Appeals disregarded federal policy and law. In Indian land claim litigation, the federal policy is unambiguous: "[O]nce a tribe makes out a *prima facie* case of prior possession *or title* to the property in dispute, the burden rests upon the non-Indians

to demonstrate otherwise." *Cayuga Indian Nation of New York v. Village of Union Springs*, *supra* (cites omitted) (emphasis added). This federal common-law policy has been adopted by Congress and codified in the Protection of Indians Act:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, *the burden of proof shall rest upon the white person whenever the Indian shall make out a presumption of title in himself* from the fact of previous ownership or possession.

25 U.S.C. § 194 (2003) (emphasis added).

The Delawares' Complaint established unextinguished aboriginal title to Tatamy's Place sufficient to proceed.[13] They unambiguously pled that they inhabited Tatamy's Place from time immemorial. Thus, they stated a prima facie case for aboriginal title. Their Complaint also stated a prima facie claim that their aboriginal title was not validly extinguished by the King of England as the sovereign.

The Delawares alleged that King Charles II of England conveyed fee title to colonial Pennsylvania to William Penn,

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13. To establish such title, an Indian tribe must show that it actually, exclusively, and continuously occupied and used property for an extended period of time. *Yankton Sioux Tribe of Indians v. South Dakota*, 796 F.2d 241, 243 (8th Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987); *see also Canadian St. Regis Band of Mohawk Indians ex rel. Francis v. New York*, 278 F.Supp. 2d 313, 343 (N.D. N.Y. 2003) (Indian tribe obtains aboriginal title when it uses and occupies property to the exclusion of other Indian tribes and persons); *Seneca Nation*, 206 F.Supp. 2d at 503.

but that Penn remained accountable to the King. Moreover, the Charter of 1681, which they attached to the Complaint, unambiguously stated that the King retained all sovereignty over colonial Pennsylvania even though he granted fee title to Penn. Fee title — *i.e.*, the "right of preemption" — and the right to extinguish aboriginal title — *i.e.*, the "right of extinguishment" — are separate powers. The right of extinguishment does not automatically pass upon acquiring fee title from the sovereign. *Seneca Nation*, 206 F. Supp. 2d at 504 (citing *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 142-43, 3 L. Ed. 162 (1810) (other cites omitted). The Delawares pled that William Penn received fee title (the right of preemption), but not the right of extinguishment.

Because they pled that aboriginal title that was not extinguished, the Delawares established a prima facie case for aboriginal title. 25 U.S.C. § 194. Accordingly, the burden then shifted to the non-Indian defendants to show otherwise. For purposes of defendants' motions to dismiss, their burden under the Indian Protection Act must be evaluated in accordance with the well established standards of Rule 12(b)(6). The district court and the Court of Appeals, however, declined to so proceed.

In ruling on defendants' dismissal motions, the district court was required by Rule 12(b)(6) to accept as true the Complaint's well pled allegations and to review those allegations in the light most favorable to the plaintiff. *Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts Inc.*, 140 F.3d 478, 483 (2nd Cir. 1998); *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (2nd Cir. 1997). It also was required

to accept as true all reasonable inferences that can be fairly drawn from the complaint, *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (2nd Cir. 1993), and to consider exhibits attached to the complaint, such as the Charter of 1681. *See City of Pittsburgh v. West Penn Power Co.*, 147 F.3d 256, 259 (2nd Cir. 1998); *Steinhardt Group, Inc. v. Citicorp*, 126 F.3d 144, 145 (2nd Cir. 1997). Under the Indian Protection Act and the Federal Rules of Civil Procedure, defendants could not defeat the Delawares' prima facie case by alleging facts outside of the Complaint.[14]

Moreover, even if the Delawares did not preserve their challenge to the "Thomas Penn sovereignty" factual dispute

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14. To the extent that the district court desired to consider facts beyond the four-corners of the complaint, it should have provided the Delawares with notice and the opportunity to present evidence in accordance with the Federal Rules of Civil Procedure. But the district court did not treat the dismissal motions as summary-judgment motions. Nor did it convert defendants' dismissal motions to summary-judgment motions as allowed in appropriate circumstances by the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 12(b). Thus, the district court erred. It is reversible error for a district court to convert a Rule 12(b)(6) motion to a Rule 56 motion without providing notice of its intent to convert and allowing the opportunity to submit evidence. *Rose v. Bartle*, 871 F.2d 331, 342 (3d Cir. 1989) (citing *Castle v. Cohen*, 840 F.2d 173, 179-80 (3d Cir. 1988) (vacating summary judgment when district court converted the Rule 12(b)(6) motion without notice to the parties); *Davis Elliott Int'l. v. Pan American Container Corp.*, 705 F.2d 705, 706-08 (3d Cir. 1983) (reversing summary judgment when the district court acted without notice to the parties and without an opportunity for hearing); *Crown Central Petroleum Corp. v. Waldman*, 634 F.2d 127, 129 (3d Cir. 1980) (reversing summary judgment when the district court acted without notice to the parties and without allowing an opportunity to submit affidavits); *Bryson v. Brand Insulations, Inc.*, 621 F.2d 556, 559 (3d Cir. 1980) (same).

(which they did), the Court of Appeals waiver finding was inappropriate under the circumstances since significant Indian interests were involved and the district court's factual conclusion was historically unsupportable.

Courts of appeals have been empowered by this Court's precedent to review district court factual determinations such as the determination the district court made here.

> [T]here are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond doubt, *see Turner v. City of Memphis*, 369 U.S. 350 (1962), or where "injustice might otherwise result." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941).

Singleton v. Wulff, 428 U.S. 106, 121 (1976). "[O]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments made below." *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *see also T I Federal Credit Union v. Delbonis*, 72 F.3d 921, 929-30 (1st Cir. 1995) (appellate courts can consider issues not adequately raised with the district court if issues implicate important constitutional or governmental issues). Plainly such issues are raised here since Indian land rights are at issue.

Since it is beyond doubt that Rule 12(b)(6) prohibits a court's consideration of extraneous facts, the Third Circuit's finding of waiver represents a "doubtful determination" in the Indian affairs context which well warrants this Court's review. *See Williams v. Lee, supra.* This is particularly so

since an injustice clearly resulted: The Court of Appeals deprived the Delawares of the opportunity to contest the district court's clearly erroneous factual determination that Thomas Penn was "the sovereign" and thereby entitled to extinguish aboriginal title. Otherwise stated, the Court of Appeals wrongly employed a rigid and improper analytical process.

In sum, the Court of Appeals reversal of the district court's pivotal and fatal factual determination was important and necessary in light of the strong federal law and policy, which impose significant burdens on non-Indians once an Indian tribe makes out a prima facie case involving title to real estate. *See Cayuga Indian Nation of New York v. Village of Union Springs*, 317 F. Supp. 2d at 138; 25 U.S.C. § 194 (2003). The Delawares' Complaint pled a plain and unambiguous intent by the actual sovereign not to extinguish aboriginal title and that claim should have been allowed to proceed. *E.g., United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 346, 354 (1941).[15] Both courts below wrongly deprived the Delaware Nation of access to the courts and to the benefit of well-developed law intended to protect Indian land rights. Intervention and correction by this Court is well warranted.

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15. The Complaint's factual allegations also demonstrate that neither Thomas Penn nor the Proprietaries intended to extinguish The Delaware Nation's aboriginal rights to Tatamy's Place. The question of intent almost always involves questions of fact that are within the exclusive province of the jury to resolve. *See, e.g., Martin Marietta Corp. v. New Jersey Nat'l Bank*, 653 F.2d 779, 782 (3d Cir. 1981) (stating that the question of intent is a question of fact to be settled by the jury).

CONCLUSION

WHEREFORE, for the foregoing reasons, the Delaware Nation's Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED MAY 4, 2006

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 04-4593

THE DELAWARE NATION, A FEDERALLY RECOGNIZED INDIAN TRIBE, IN ITS OWN NAME AND AS THE SUCCESSOR IN INTEREST TO "MOSES" TUNDY TETAMY, A FORMER CHIEF OF THE DELAWARE NATION, AND OF HIS DESCENDANTS

v.

COMMONWEALTH OF PENNSYLVANIA; EDWARD G. RENDELL; COUNTY OF NORTHAMPTON, PENNSYLVANIA; J. MICHAEL DOWD; RON ANGLE; MICHAEL F. CORRIERE; MARY ENSSLIN; MARGARET FERRARO; WAYNE A. GRUBE; ANN MCHALE; TIMOTHY B. MERWARTH; NICK R. SABATINE; COUNTY OF BUCKS, PENNSYLVANIA; MICHAEL G. FITZPATRICK; CHARLES H. MARTIN; SANDRA A. MILLER; TOWNSHIP OF FORKS, PENNSYLVANIA; JOHN ACKERMAN; DAVID KOLB; DONALD H. MILLER; DAVID W. HOFF; HENNING HOLMGAARD; BINNEY & SMITH, INC.; FOLLETT CORPORATION; ROBERT AERNI; MARY ANN AERNI; AUDREY BAUMAN; DANIEL O. LICHTENWALNER; JOAN B. LICHTENWALNER; CAROL A. MIGLIACCIO; JOSEPH M. PADULA; MARY L. PADULA; JACK REESE; JEAN REESE; ELMORE H. REISS; DOROTHY H. REISS; GAIL

Appendix A

N. ROBERTS; CARL W. ROBERTS; WARREN F. WERKHEISER; ADA A. WERKHEISER; WARREN NEILL WERKHEISER; NICK ZAWARSKI AND SONS DEVELOPERS INC.; JOHN DOES 1-250; JOHN DOE COMPANY; MARK SAMPSON; CATHY SAMPSON

The Delaware Nation,

Appellant.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 04-cv-00166)
District Judge: Honorable James McGirr Kelly

Argued November 8, 2005

Before ROTH, FUENTES, and GARTH, *Circuit Judges.*

(Opinion Filed May 4, 2006)

OPINION OF THE COURT

ROTH, *Circuit Judge:*

This case arises from the claim of an American Indian nation to a portion of its aboriginal land. For the reasons that follow, we find that any aboriginal rights held by the Delaware Nation to the land known as "Tatamy's Place" were extinguished by Thomas Penn via the Walking Purchase of 1737. We also find that the tribe does not hold fee title to Tatamy's Place. Thus, the District Court properly dismissed

the Delaware Nation's claim pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a cause of action. *The Delaware Nation v. Commonwealth of Pa., et al.*, 2004 U.S. Dist. Lexis 24178, 2004 WL 2755545 (E.D.Pa.2004). Accordingly, we will affirm the dismissal order of the District Court although we do not base our conclusion on the same reasoning.

I. Background

In January 2004, the Delaware Nation filed this lawsuit, as the successor in interest and political continuation of the Lenni Lenape and of Lenni Lenape Chief "Moses" Tundy Tatamy, claiming aboriginal and fee title to 315 acres of land located in Northampton County, Pennsylvania, known as "Tatamy's Place."[1] The defendants in this case are residents or businesses, currently occupying the land, or government entities sanctioning the tenants' possession. The Delaware Nation seeks to enforce its rights to Tatamy's Place pursuant to the Trade and Intercourse Act, also known as the Indian Nonintercourse Act, 25 U.S.C. § 177 (1799), and federal common law. The Delaware Nation is seeking both equitable relief and monetary damages.

The history of Tatamy's Place is yet another sad example of our forefathers' interactions with the Indian nations. The following historical allegations are taken from the Complaint and the public record.[2] In 1681, William Penn secured a

1. For purposes of this appeal, the Lenni Lenape and the Delaware Nation are synonymous.

2. Courts may consider matters of public record, exhibits attached to the complaint, and undisputedly authentic documents attached to a motion to dismiss. *See Pension Benefit Guar. Corp. v. White Consol. Indus. Inc.*, 998 F.2d 1192, 1196 (3d Cir.1993).

Appendix A

Charter from King Charles II for what is now Pennsylvania. Through the Charter, William Penn and his heirs were vested with control of Pennsylvania's land as its Proprietor.[3] William Penn formed a government consisting of three branches: (1) a governor with limited powers, (2) a legislative Council empowered to propose legislation, and (3) a General Assembly empowered to approve or reject the legislative initiatives proposed by the Council. Sections XVII through XIX of the Charter established a proprietary government that "gave Penn broad powers in selling or renting his lands. Those purchasing land from him must have his approval of any method they themselves might use to sell the land to others." Penn's government provided for "secure private property."

In contrast to governors of other colonies, William Penn achieved peaceful relations with the Indians, including the Lenni Lenape, by acquiring land through purchase rather than conquest. William Penn's son, Thomas, was one of the eventual successors to his father's interests in Pennsylvania.[4] In 1737, Thomas Penn executed the now-infamous "Walking Purchase" with the Delaware Nation. This purchase included Tatamy's Place. To make a tragic story short, the Walking

3. A proprietor is "[o]ne who has the legal right or exclusive title to property, business, etc." Black's Law Dictionary 1220 (6th ed.1990).

4. Following a stroke in 1712, William Penn's second wife became the Proprietor of the province until her death in 1727. Penn's sons and grandsons then became the Proprietors of the territory.

Purchase was the result of a massive fraud perpetuated by Thomas Penn on the Delaware Nation.[5]

Although most members of the Delaware Nation left the area following the Walking Purchase, a leader of the group, Chief Tatamy, continued to occupy Tatamy's Place with the approval of the Penns. In consideration for Chief Tatamy's friendship towards the white settlers, he was issued two land patents for Tatamy's Place-both of which postdate the Walking Purchase. The first patent was dated April 28, 1738, and the second was dated January 22, 1741.

The 1741 Patent provided:

> at the Instance and request of the said Tundy Tatamy in consideration of his Surrendering and delivering up to be Cancelled the said former patent of the said Premises & of the Sum of Forty Eight Pounds Sixteen shillings and five Pence lawful Money of Pennsylvania to our use paid by the said Tundy Tatamy . . . We have given granted released & confirmed and by these presents for us our Heirs and Successors do grant release and

5. Thomas Penn falsely represented to the Lenni Lenape that some fifty years earlier the Lenni Lenape Chiefs had signed a document providing that land, which could be covered in a walk of one-and-one-half days, was to be deeded to the Penns. Unbeknownst to the Lenni Lenape, who had envisioned a leisurely walk through the tangled Pennsylvania forests, Thomas Penn had cleared a path and hired three of the fastest runners in the territory to navigate a pre-determined path. The Lenni Lenape ended up ceding 1,200 square miles of land. The document later proved to be a forgery.

> confirm unto said Tundy Tatamy and his Heirs the said Three hundred and fifteen Acres of Land as the same now set forth . . .

Also, Chief Tatamy had to seek special permission from the Provincial Council of Pennsylvania to remain in Tatamy's Place following the Walking Purchase. The Minutes of the Provincial Council meeting of November 20, 1742, indicate that the Governor granted permission to Chief Tatamy to remain on his land on the express condition that "the other Petitioners were by no means to be included in this Permission, nor any other of the Delaware Indians, whom they call their Cousins, nor any besides themselves and their proper families dwelling in the same Houses with them."[6] IV MINUTES OF THE PROVINCIAL COUNCIL at 625.

After Chief Tatamy, the history of the title to the land is not clear. The next record concerning Tatamy's Place is a deed recorded on March 12, 1803, in which Edward Shipper, as the Executor of the Estate of William Allen, conveys the land to the Strecher family. The deed recites a purported agreement between the Strechers and Allen forty years prior

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6. The Minutes of the Provincial Council were compiled and printed pursuant to Pennsylvania law as a public record. Act of April 14, 1838, Act No. 68, P.L. 395, § 7 ("That the Secretary of the Commonwealth be, and he is hereby authorized and required to continue the printing of the Minutes of the Council of the Proprietary Government, down to the period of the Revolution . . . and to include *other public records* and documents therein mentioned . . .") (emphasis added). Therefore, the Minutes may be considered by the Court on a motion to dismiss. *See Pension Benefit Guar. Corp.*, 998 F.2d at 1196.

to Allen's death. Nonetheless, the history fails to explain how title passed from Chief Tatamy to William Allen or his predecessors.

The Delaware Nation's Complaint alleges two general theories as to why the group is entitled to recovery. First, the Delaware Nation contends that, because Tatamy's Place was taken by deception via the Walking Purchase, the tribe's aboriginal rights were never validly extinguished. As such, the Delaware Nation has a right of continued occupancy and use consistent with the doctrine of discovery. Second, the Delaware Nation, as the successor in interest to Chief Tatamy, claims fee title to Tatamy's Place based on the land grants from the Proprietors. The Delaware Nation further asserts that the subsequent alienation of fee title from Chief Tatamy violated the Trade and Intercourse Act of 1799. 1 Stat. 743, 746 (1799).[7]

On November 30, 2004, the District Court dismissed the Complaint in its entirety for failure to state a cause of action. *The Delaware Nation,* 2004 U.S. Dist. Lexis 24178; Fed. R. Civ. Proc. 12(b)(6). The District Court, having found that the Delaware Nation admitted that Thomas Penn had the

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7. The Trade and Intercourse Act of 1799 provides in part:

> No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same by made by treaty or convention, entered into, pursuant to the constitution.

sovereign authority to take Tatamy's Place, ruled that Thomas Penn's method of acquisition, *i.e.* fraud, was legally irrelevant. Moreover, the District Court found that the Nonintercourse Act was inapplicable in this case because Tatamy's Place did not represent "tribal land." The Delaware Nation appealed.

II. Jurisdiction and Standard of Review

Our review of the grant of a motion to dismiss is plenary. *Jordan v. Fox, Rothschild, O'Brien & Frankel,* 20 F.3d 1250 (3d Cir.1994). When considering an appeal from a dismissal of a complaint pursuant to Rule 12(b)(6), we accept as true all well-pled factual allegations. *Morse v. Lower Merion School District,* 132 F.3d 902, 906 (3d Cir.1997). We examine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief. *Pinker v. Roche Holdings, Ltd.,* 292 F.3d 361, 374 n. 7 (3d Cir.2002).

The District Court exercised jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1362 ("The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."). The Delaware Nation is recognized by the Secretary of the Interior. *See* 67 Fed.Reg. 46328 (2002). We have jurisdiction under 28 U.S.C. § 1291.

III. Discussion

A. Thomas Penn's Extinguishment of Aboriginal Rights[8]

The doctrine of discovery, which governs the relationship between the European colonial powers and the Indians, holds that the discovering nation takes fee title to the land, subject to the aboriginals' right of occupancy and use. *County of Oneida v. Oneida Indian Nation of New York State,* 470 U.S. 226, 234, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985); *Johnson v. M'Intosh,* 8 Wheat. 543, 21 U.S. 543, 588, 5 L.Ed. 681 (1823) ("All our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognise the absolute title of the crown to extinguish that right."). The Indians' right of occupancy and use (aboriginal title) could only be extinguished with the consent of the sovereign. *County of Oneida,* 470 U.S. at 234, 105 S.Ct. 1245. The Delaware Nation claims in its appeal that the King

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8. Some of the defendants urge us to dismiss the complaint because this action is barred by the equitable doctrines of laches, acquiescence and impossibility. These defendants cite *City of Sherrill v. Oneida Nation of New York,* 544 U.S. 197, 125 S.Ct. 1478, 161 L.Ed.2d 386 (2005), and claim that the same considerations that led the *Sherrill* court to rule against the Oneida Indian Nation are relevant here. We need not address this argument because we find that the Delaware Nation's claims fail on the merits.

Some of the defendants also argue that the Delaware Nation's aboriginal title was extinguished when the tribe signed the Treaty of Greeneville of 1795. We need not address this argument either-or explain the treaty's provisions-because we find that the Walking Purchase of 1737 extinguished the tribe's aboriginal title.

of England—not Thomas Penn—was the sovereign over the territory that included Tatamy's Place. Therefore, Thomas Penn could not extinguish aboriginal title via the Walking Purchase and, consequently, the Delaware Nation maintains a right of occupancy and use.

The Delaware Nation's argument fails because the issue of Thomas Penn's lack of sovereign authority was not raised before the District Court. *The Delaware Nation,* 2004 U.S. Dist. Lexis 24178, ("Plaintiff does not contest that Thomas Penn and the other Proprietors of the time maintained sovereign authority to extinguish this aboriginal title."). The closest the Delaware Nation comes to raising the issue is ¶ 31 of its Complaint, in which it notes that the Penns were "accountable directly to the King of England." However, this paragraph fails to put the District Court or the defendants on notice of the Delaware Nation's purported argument on appeal-that Thomas Penn lacked the sovereign authority or consent from the King of England to extinguish aboriginal title in Pennsylvania.[9]

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9. The Delaware Nation seemed to claim at oral argument that such sovereign authority could not be delegated by the King. This argument, also, was not raised before the District Court. Only in exceptional circumstances, where under the circumstances it would be just to do so, will we consider issues that were not raised in the district court. *Wagner v. PennWest Farm Credit,* 109 F.3d 909, 911 (3d Cir.1997). Although the exceptional circumstances exception has been read to apply to situations where there has been an intervening change in law or the lack of representation by an attorney, a general public interest exception does exist. *In re Gen. Datacomm Indus. Inc.,* 407 F.3d 616, 624 n. 13 (3d Cir.2005). The Delaware Nation fails, however, to articulate an exceptional circumstance.

Absent exceptional circumstances, this Court will not consider issues raised for the first time on appeal. *Harris v. City of Philadelphia,* 35 F.3d 840, 845 (3d Cir.1994). Although the Delaware Nation now contends that it did not *concede* the argument that Thomas Penn had the sovereign authority to extinguish aboriginal title, it does not, and cannot, argue that it *raised* the issue before the District Court. *See Houghton v. American Guaranty Life Ins. Co.,* 692 F.2d 289, 294-5 (3d Cir.1982) (noting that the issue must be brought to the attention of the district court to be heard on appeal). Therefore, the issue is waived.

The Delaware Nation next argues that, even if Thomas Penn was sovereign and had the power to extinguish its aboriginal title with the Walking Purchase, he did not do so because the circumstances surrounding the Walking Purchase were fraudulent, and "fraud is not a valid means to extinguish aboriginal title." However, the manner, method, and time of the sovereign's extinguishment of aboriginal title raise political, not justiciable, issues. *United States v. Santa Fe Pac. R.R. Co.,* 314 U.S. 339, 347, 62 S.Ct. 248, 86 L.Ed. 260 (1941). "[W]hether (extinguishment) be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, *or otherwise,* its justness is not open to inquiry in the courts." *Id.* (emphasis added); *United States v. Alcea Band of Tillamooks,* 329 U.S. 40, 46, 67 S.Ct. 167, 91 L.Ed. 29 (1946) (noting that the sovereign "possessed exclusive power to extinguish the right of occupancy at will."). Accordingly, the District Court correctly held that "[p]roof of fraud is not a material fact

that would nullify Proprietory Thomas Penn's extinguishing act." *The Delaware Nation,* 2004 U.S. Dist. Lexis 24178, *28.[10]

For extinguishment to occur, the sovereign must intend to revoke the Indians' occupancy rights. *United States v. Gemmill,* 535 F.2d 1145, 1148 (9th Cir.1976). The intent to extinguish aboriginal title must be "plain and unambiguous" based on either the face of the instrument or surrounding circumstances. *Seneca Nation of Indians v. New York,* 382 F.3d 245, 260 (2d Cir.2004). Extinguishment cannot be lightly implied. *Santa Fe Pac. R.R. Co.,* 314 U.S. at 354, 62 S.Ct. 248.

The District Court held that the Delaware Nation's Complaint made it clear that Thomas Penn executed the Walking Purchase intending to take from the Delaware Nation its claim to land in Pennsylvania, including Tatamy's Place. *The Delaware Nation,* 2004 U.S. Dist. Lexis 24178, *28-9. The Complaint notes that Thomas Penn, in order to pay creditors, needed to sell tribal land. To acquire such land, in the first place Thomas Penn executed the Walking Purchase. Complaint at ¶ 38. To now argue that Thomas Penn did not

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10. Against the aforementioned Supreme Court precedent, the Delaware Nation offers a Western District of New York case for the proposition that aboriginal title can only be extinguished by (1) war or physical dispossession or (2) contract or treaty. *Seneca Nation of Indians v. New York,* 206 F.Supp.2d. 448, 504 (W.D.N.Y.2002). *Seneca Nation* is in no way controlling precedent. Nor, indeed, does it help the Delaware Nation because it does not challenge the nonjusticiable nature of the manner in which the sovereign executes a purchase or a treaty with an Indian entity.

intend to extinguish aboriginal title to Tatamy's Place, which is indisputably land covered by the Walking Purchase, contradicts the very allegations of the Complaint. Put another way, there are no facts or allegations in the public record or in the Complaint which could be used to question Thomas Penn's intention to extinguish aboriginal rights in Tatamy's Place. Moreover, if the Delaware Nation still retained aboriginal title to Tatamy's Place, there would have been no need to grant Tatamy the 1741 patent in fee.

B. Chief Tatamy's Land Patents

The Delaware Nation argues that, even if Thomas Penn did extinguish its aboriginal title to Tatamy's Place, it may nonetheless pursue its claim under the Nonintercourse Act because it holds fee title to Tatamy's Place. It acquired this fee title, the tribe explains, when the Proprietors granted Tatamy's Place to Chief Tatamy because the Chief accepted the title not in his individual capacity, but as a representative of the tribe.[11] Even assuming that the Nonintercourse Act applies to land reacquired by an Indian tribe in fee after the

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11. The District Court thought the Delaware Nation had argued that the 1738 and 1741 patents "revived" the tribe's aboriginal title. It rejected that argument, holding that aboriginal title, "once having been extinguished, could not be revived, even if title was thereafter acquired by those who originally possessed that" title. District Court Opinion at 28 (citing *Tuscarora Nation of Indians v. Power Authority of the State of New York,* 164 F.Supp. 107 (W.D.N.Y.1958)). The Delaware Nation clarifies in its brief that it "never asserted that . . . its rights were . . . revived by way of the patent grants to Chief Tatamy," but rather that the tribe has "two parallel interests" in Tatamy's Place: aboriginal title and fee title. Brief at 37.

sovereign extinguished its aboriginal rights to the land-an issue which appears to be unsettled,[12] but which is not necessary for us to decide here-the Delaware Nation's claim must fail because it is clear that the Proprietors granted Tatamy's Place to Chief Tatamy in his individual capacity, and not as an agent of the tribe.

As noted earlier, the Nonintercourse Act provides, in pertinent part:

> No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty or convention, entered into, pursuant to the Constitution.

25 U.S.C. § 177.

To establish a *prima facie* case for violation of the Act, the Delaware Nation is required to allege that (1) it is an Indian tribe, (2) the land in question is tribal land, (3) the sovereign has never consented to or approved the alienation of this tribal land, and (4) the trust relationship between the

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12. *See, e.g., Cass County, Minnesota v. Leech Lake Band of Chippewa Indians,* 524 U.S. 103, 115 n. 5, 118 S.Ct. 1904, 141 L.Ed.2d 90 (1998) ("This Court has never determined whether the Indian Nonintercourse Act ··· applies to land that has been rendered alienable by Congress," *i.e.,* land the aboriginal title to which the sovereign has extinguished, "and later reacquired by an Indian tribe.").

United States and the tribe has not been terminated or abandoned. *Seneca Nation,* 382 F.3d at 258; *Golden Hill Paugussett Tribe of Indians v. Weicker,* 39 F.3d 51, 56 (2d Cir.1994); *Epps v. Andrus,* 611 F.2d 915, 917 (1st Cir.1979) (overruled on other grounds).

The Delaware Nation claims that the land in question-Tatamy's Place-is "tribal land" (element 2) because it holds fee title to the land as a tribe. The language of the 1741 land patent suggests otherwise.

In interpreting grants of land by the government, intent of the government is a prominent consideration, and the language of the grants is to be strictly construed. 3 Norman J. Singer, Sutherland Statutory Construction § 64:7 (6th ed.2000). The language of the 1741 patent, quoted earlier, unambiguously conveyed land to an individual-Chief Tatamy and his heirs. It did not convey to the tribe. It is not necessary to look beyond the four corners of the patent, but we nonetheless note that the minutes of the Provincial Council, also quoted above, explicitly confirm that the Proprietors intended the land to go to Chief Tatamy alone, and not "any other of the Delaware Indians."

The Delaware Nation presses the argument that, even if the Proprietors did not intend in 1741 to grant the land to the tribe as a collective, this is how the tribe received the grant because "the Lenni Lenape did not recognize the concept of individual ownership of land."[13] This argument is

13. To demonstrate that conveyances to Indian tribes as collectives were common, the tribe cites *Mashpee Tribe v. Watt,* 542 (Cont'd)

unpersuasive. The subjective state of mind of the grantee is not a consideration in interpreting public land grants. Moreover, and quite notably, the Complaint nowhere clearly alleges that Chief Tatamy intended to receive the 1741 land patent in his capacity as representative of the tribe.[14]

None of the canons of construction that the parties urge the court to apply (e.g., construing agreements with Indians "in the sense in which they would naturally be understood by the Indians," resolving ambiguities in public land grants

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(Cont'd)

F.Supp. 797, 805 (D.Ma.1982). That case, however, notes that the practice of a tribe's chief or head man granting land to a non-Indian as a representative of his tribe was common. The tribe points to no case in which land was granted to an individual Indian in fee simple with the unexpressed intention that that Indian's entire tribe receive the conveyance. Moreover, there are many treaties from a later period in which the United States, intending to grant land in fee simple to an Indian tribe, did so by designating the tribe explicitly as the grantee, which the Proprietors did not do here. See *Cohen's Handbook of Federal Indian Law* § 9.4, footnotes 22-26 and accompanying text (quoting treaties that grant land in fee simple to, for example, "the Wyandotts, and to their heirs forever" and "to the Creek nation of Indians . . . and the right thus guaranteed by the United States shall be continued to said tribe of Indians, so long as they shall exist as a nation").

14. Paragraph 10 of the Complaint refers generally to communal ownership of land by the Delaware Nation, but the allegations of succeeding paragraphs-particularly paragraphs 42, 43, 44 and 45-all speak in terms of an individual grantee. For example, 45 states that "Chief Tatamy's fee simple ownership of Tatamy's Place is documented and indisputable. Neither he nor his heirs ever divested their interest in Tatamy's Place."

in favor of the government, etc.) are applicable because the terms of the land patent are completely unambiguous. The Delaware Nation fails to state a claim under the Nonintercourse Act because the land in question is not "tribal" in any sense of that word.[15]

IV. Conclusion

For the foregoing reasons, we find that the Delaware Nation's aboriginal rights to Tatamy's Place were extinguished in 1737 and that, later, fee title to the land was granted to Chief Tatam—not to the tribe as a collectivity. We will thus affirm the District Court's dismissal of the Delaware Nation's Complaint.

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15. In addition, Judge Roth would hold that the Nonintercourse Act claim would fail even had the land in question been tribal because the Delaware Nation failed to identify a specific land conveyance that violated the Act or to allege that the gap in the chain of title post-dates the Nonintercourse Act's enactment.

APPENDIX B — ORDER AMENDING OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 04-4593

THE DELAWARE NATION, A FEDERALLY RECOGNIZED INDIAN TRIBE, IN ITS OWN NAME AND AS THE SUCCESSOR IN INTEREST TO "MOSES" TUNDY TETAMY, A FORMER CHIEF OF THE DELAWARE NATION, AND OF HIS DESCENDANTS

v.

COMMONWEALTH OF PENNSYLVANIA; EDWARD G. RENDELL; COUNTY OF NORTHAMPTON, PENNSYLVANIA; J. MICHAEL DOWD; RON ANGLE; MICHAEL F. CORRIERE; MARY ENSSLIN; MARGARET FERRARO; WAYNE A. GRUBE; ANN MCHALE; TIMOTHY B. MERWARTH; NICK R. SABATINE; COUNTY OF BUCKS, PENNSYLVANIA; MICHAEL G. FITZPATRICK; CHARLES H. MARTIN; SANDRA A. MILLER; TOWNSHIP OF FORKS, PENNSYLVANIA; JOHN ACKERMAN; DAVID KOLB; DONALD H. MILLER; DAVID W. HOFF; HENNING HOLMGAARD; BINNEY & SMITH, INC.; FOLLETT CORPORATION; ROBERT AERNI; MARY ANN AERNI; AUDREY BAUMAN; DANIEL O. LICHTENWALNER; JOAN B. LICHTENWALNER; CAROL A. MIGLIACCIO; JOSEPH M. PADULA; MARY L. PADULA; JACK REESE; JEAN REESE; ELMORE H. REISS; DOROTHY H. REISS; GAIL

Appendix B

N. ROBERTS; CARL W. ROBERTS; WARREN F. WERKHEISER; ADA A. WERKHEISER; WARREN NEILL WERKHEISER; NICK ZAWARSKI AND SONS DEVELOPERS INC.; JOHN DOES 1-250; JOHN DOE COMPANY; MARK SAMPSON; CATHY SAMPSON

The Delaware Nation,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 04-cv-00166)
District Judge: Honorable James McGirr Kelly

Argued November 8, 2005

Before: FUENTES, GARTH and ROTH*, *Circuit Judges.*

ORDER AMENDING OPINION

IT IS ORDERED that the published Opinion in the above case, filed on May 4, 2006, be amended as follows:

On page 13, delete the following paragraph:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians,

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* Judge Roth assumed senior status on May 31, 2006.

shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution.

and **replace it with:**

No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same by made by treaty or convention, entered into, pursuant to the constitution

By the Court,

/s/ Jane R. Roth
Circuit Judge

Dated: June 14, 2006

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED NOVEMBER 30, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 04-CV-166

THE DELAWARE NATION,

Plaintiff,

v.

COMMONWEALTH OF PENNSYLVANIA, et al.,

Defendants.

MEMORANDUM AND ORDER

J. M. KELLY, J. **NOVEMBER 30, 2004**

Presently before the Court are nine Motions to Dismiss filed by the following groups of defendants: (1) Jack and Jean Reese (Doc. No. 55), (2) Forks Township, John Ackerman, David Kolb, Donald H. Miller, David W. Hof, and Henning Holmgaard (Doc. No. 56), (3) Binney & Smith, Inc., the Follett Corporation, Carol A. Migliaccio, Nic Zawarski and Sons Developers Inc., Daniel O.

Lichtenwalner, and Joan B. Lichtenwalner (the "Binney & Smith defendants") (Doc. No. 57), (4) the Commonwealth of Pennsylvania (Doc. No. 58), (5) Audrey Baumann (Doc. No. 60), (6) W. Neill Werkheiser, Warren F. Werkheiser, Carl W. and Gail N. Roberts, Robert and Mary Ann Aerni, and Mark and Cathy Sampson (Doc. No. 62), (7) the County of Northampton, Pennsylvania and the nine members of Northampton County Council in their official capacity, who are named as J. Michael Dowd, Ron Angle, Michael F. Corriere, Mary Ensslin, Margaret Ferraro, Wayne A. Grube, Ann McHale, Timothy B. Merwarth and Nick R. Sabatine, (Doc. No. 63), (8) the Honorable Edward G. Rendell (Doc. No. 64), and (9) the County of Bucks, Pennsylvania (Doc. No. 66) (collectively, the "Defendants") requesting that this Court dismiss Plaintiff The Delaware Nation's ("Plaintiff") Complaint against the Defendants pursuant to Federal Rule of Civil Procedure 12(b)(6) for Plaintiff's failure to plead facts sufficient to support a claim to the parcel of land at the center of this dispute.[1] Also before the Court are Plaintiff's Responses to the Motions to Dismiss (Doc. Nos. 84, 85, 86, 87, 88, 89, 90, 91, & 92), the Defendants' Replies (Doc. Nos. 93, 94, 95, & 101), and Plaintiff's Sur-Reply thereto (Doc. No. 105).

In addition, on October 6, 2004, the Court heard oral argument on the Motions to Dismiss and circulated a

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1. The parties stipulated to the dismissal of Defendants the County of Bucks, Pennsylvania, and the Commonwealth of Pennsylvania. (*See* Doc. Nos. 116, 117.) Defendant Audrey Baumann and the Binney & Smith defendants also move to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 19 arguing that the Commonwealth is an indispensable party to Plaintiff's suit.

memorandum that posed specific questions to which the Court allowed the parties time to respond if they so desired. To the extent that they present considerations appropriate to the Motions to Dismiss, those responsive papers are also before the Court (Doc. Nos. 110, 111, 112, 113, & 114).

In this action, Plaintiff, The Delaware Nation, a federally recognized Native American tribe seeks to recover possession of 315 acres of land purchased from the Proprietors of Pennsylvania in 1741. For the following reasons, the Defendants' Motions to Dismiss are **GRANTED.**

I. BACKGROUND

Plaintiffs' Complaint alleges the following facts.

A. The 1681 Charter of the Province of Pennsylvania

On March 4, 1681, King Charles II granted a request from William Penn ("Penn") for a charter (the "Charter") to, establish a British colony in North America, which later was named the Province of Pennsylvania. Through the Charter, King Charles vested Penn and his heirs with control of Pennsylvania's land. Therefore, much of the recorded Proprietor history of the Commonwealth of Pennsylvania begins with its founder, Penn.

Penn was born in London, England in the year 1644. In 1696, Penn married his second wife, Hannah Callowhill, who prior to her death in 1727 bore Penn three sons, John, Thomas and Richard.

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B. Pennsylvania's Early Inhabitants

When Penn first visited North America to settle Pennsylvania, he found that Germans, Dutch and Native Americans already, inhabited the territory without any particular governmental framework. In contrast to the Germans and Dutch inhabitants, however, Native Americans lived in Pennsylvania for centuries prior to Penn's first visit. Among these Native American tribes with historic roots in Pennsylvania is The Delaware Nation, which inhabited large portions of the eastern seaboard.

The Delaware Nation is the political continuation of the Lenni Lenape tribe. Members of the Lenni Lenape tribe living on land bordering the Delaware River were referred to by the European explorers and settlers as the "Delaware" Indian Tribe, as a consequence of their geographic location. Over time, the Lenni Lenape became known as The Delaware Nation and is recognized as such by the United States government.

C. William Penn's Government

The Charter vested Penn and his heirs with all of the land thereunder as the proprietor of the Province of Pennsylvania. Penn was to be accountable directly to the King of England. In addition, the Charter required Penn to make yearly payments to the Crown consisting of "two beaver skins and a fifth of any gold and silver mined within the territory." With respect to land claims, Section XVII through XIX of the Charter established a proprietary government that "gave Penn broad powers in selling or renting his lands. Those

purchasing land from him must have his approval of any method they themselves might use to sell the land to others." (Compl. ¶ 31.)

Shortly after his arrival in North America, Penn formed a government consisting of three branches: (1) governor with limited powers, (2) a legislative Council, which was empowered to propose legislation, and (3) a General Assembly, which was empowered to approve or defeat the legislative initiatives proposed by the legislative Council. Among other rights that were created, Penn's government provided for "secure private property." (*Id.* ¶ 32.)

Penn's government and practices apparently differed sharply from the Puritan-led governments of the other American colonies. The most striking difference was Penn's ability to cultivate a positive relationship based on mutual respect with the Native Americans inhabiting the province. While the Puritans "stole from the Indians. Penn achieved peaceful relations with the Indians." (*Id.* ¶ 33.)

The Charter provided the foundation for Penn's authority over the Province of Pennsylvania for nearly a century following its issuance by King Charles II. The Charter was then nullified by the American colonies following the signing of the Declaration of Independence, the Revolutionary War, and the Treaty of Paris of 1783, pursuant to which the, province became an independent state known as the Commonwealth of Pennsylvania.

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D. William Penn's Native American Dealings

Upon his arrival in America, Penn entered into numerous property agreements with the Lenni Lenape, who inhabited areas of the Province of Pennsylvania. Although Penn accepted title to the land from the English King, "he took steps to establish peaceful relations with the Indians. He was careful to acquire the land from them by purchase [(rather than conquest)], and to this end he and his agents held frequent conferences with the local Delaware chiefs and their retinue." (Compl. ¶ 35.) Penn recognized the aboriginal land claims of the Native Americans, and "from the very beginning, he acquired Indian land through peaceful, voluntary exchange." (*Id.*) By way of example, shortly after his arrival in 1682, Penn entered into "The Great Treaty" with Delaware Chief Tamanend, pursuant to which he paid the Indians a "fair value" for the use of the land by the settlers. (*Id.*)

Although no written copies of The Great Treaty are known to exist, it is known to have been a treaty of friendship and is indicative of mutual respect between Penn and members of the Lenni Lenape Tribe. Penn's fair treatment of the Tribe benefitted the entire province, "Penn's policy of dealing fairly with the region's native peoples protected European settlers from hostilities during his lifetime and after, until 1755. By then, the growing number of English colonists arriving on the eastern seaboard had alarmed the native peoples, many of whom allied with the French for survival of their ancestral lands." (*Id.* ¶ 36.)

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In addition to The Great Treaty, Penn brokered at least eight other land transactions with the Lenni Lenape leaders, including the first written treaty dated July 15, 1682. For Penn, "the only practical and legal way to get their land and secure their friendship was the treaty. The treaty also demonstrated Penn's claim to the land to his investors, who would have been much less interested in the venture without clear title." (*Id.* ¶ 37.) Consequently, Penn and his agents began the process of buying land from its Native "holders." These "holders" were various Lenni Lenape chiefs. Penn's fair dealings with the Lenni Lenape earned him their respect and loyalty.

After Penn's death, "the new government was impatient for expansion. New immigrants were arriving, filling up the cities and clamoring to officials for land in order to earn a living and support their families. Settlement of Indian lands increased, often taken by force, causing much friction with the [Indians]." (*Id.*) Following a stroke in 1712, William Penn's second wife, Hannah, assumed proprietary authority over the province until her death in 1727. Penn's sons and grandsons then became the Proprietors of the province. As the Proprietors of Pennsylvania, Penn's sons executed the "Walking Purchase of 1737" pursuant to which they acquired 1,200 square miles of Lenni Lenape land within the Delaware River Basin of Pennsylvania.

E. The Walking Purchase of 1737

Penn's sons were less interested than their father in cultivating a friendship with the Lenni Lenape. Thomas Penn, in particular, is reportedly responsible for executing The

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Walking Purchase of 1737, pursuant to which Thomas Penn approached the Lenni Lenape Chiefs and "falsely represented an old, incomplete, unsigned draft of a deed as a legal contract." (*Compl.* ¶ 38.) Thomas Penn represented to the Lenni Lenape Chiefs that some fifty years prior, the ancestors of the Lenni Lenape had signed documents stating that the "land to be deeded to the Penns was as much as could be covered in a day-and-a-half's walk." (*Id.*) Believing that their forefathers had made such an agreement, the Lenni Lenape Chiefs agreed to the terms of the deed and consented to the day-and-a-half walk.

The Lenni Lenape Chiefs trusted that the "white men" would take a leisurely walk through the tangled Pennsylvanian forests along the Delaware. The Chiefs were not aware that they were about to lose a significant amount of land. Unbeknownst to the Lenni Lenape, Thomas Penn took measures to ensure that the distance covered by his "walkers" would be as large as possible. Among other things, Thomas Penn had a straight path cleared through the forests and hired three of the fastest runners in the province. "[H]e and his agents spent weeks mapping their route—which went northwest rather than north as the treaty specified—hacking trails out of the woods. (*Id.* ¶ 39.) In addition, Thomas Penn promised that the fastest runner would receive five pounds sterling and 500 acres of land. In the end, the runners of the Walking Purchase of 1737 procured 1,200 square miles of Lenni Lenape land in Pennsylvania. Included in the land procured was land commonly referred to as the "Forks of the Delaware," which contained the parcel of land at the center of this dispute, "Tatamy's Place."

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The Lenni Lenape complained to the King of England about the execution of the "walk" by Penn and his agents to no avail. In response, the Lenni Lenape began their movement westward in compliance with their ancestors' purported agreement to the terms of the Walking Purchase's deed. Over a hundred years later, experts examining this deed concluded that the deed was a forgery. As a result of the Walking Purchase, members of the Lenni Lenape tribe, now recognized as The Delaware Nation, were segregated into pockets or parcels of land surrounded by non-tribal settlers. Such is what occurred with respect to a grant of land to Chief Tetamy and his band of Delawares.

F. The Tetamy Patents

At the time of the Walking Purchase, Chief Tetamy was a respected inhabitant of the Forks of the Delaware area. He has been described as "a Delaware Indian diplomat, chieftain, messenger, interpreter, landowner and Christian." He and his wife were the first Indians to be baptized in the Forks area. In total, twelve members of the dwindling Indian community living in the Forks area were baptized, five of whom were members of Chief Tetamy's family. Following his conversion to Christianity, Chief Tetamy was commonly referred to as "Moses" Tundy Tetamy. Chief Tetamy enjoyed a reputation of being "a friend to the white man," and often served as an interpreter for agents of the Proprietors, including the Governor of the province.

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In 1738,[2] the Proprietors,' in consideration of their "love and affection" of Chief Tundy Tetamy and in recognition for his services as a messenger and interpreter for the Penn family, granted to Tundy Tetamy and his heirs, a Patent to the land which became known as Tatamy's Place. Further evidence of the respect garnered by Chief Tetamy, is the town of Tatamy, Pennsylvania, which takes its namesake from the Delaware Chief and is not far from the property known as Tatamy's Place.

Tundy Tetamy's name first appears in official Pennsylvania land records under the date of March 24, 1733, when he applied for his land grant to Tatamy's Place. The application states: "Tattemy an Indian has improved a piece of Land of about 300 Acres on the forks of Delaware—he is known to Wm Allen & Jere: Langhorne—he desires a Grant for the said Land." (Compl. ¶ 43 (citing, Pennsylvania Land Records, Applications 1732-33:17).) Two prominent men in the province endorsed Tundy Tetamy's application for the land grant: (1) Jeremiah Langhorne served as chief justice of the province from 1726 until his death in 1742; and (2) William Allen, an assemblyman at the time, served as chief justice from 1750 to 1774. Both men became well-known, early landowners in the Forks area. On December 13, 1736, a warrant (the "Warrant") duly recorded in the Warrant Application Books of Bucks County, at T-14, was issued by the Proprietors. The Warrant required that a survey of

2. Paragraph forty-two of Plaintiff's Complaint contains a typographical error. This paragraph incorrectly states that the first recorded land patent was granted to Tundy Tetamy in 1736. Paragraph forty-four and Exhibit E of the Complaint, however, correctly state the first recorded patent was granted in 1738.

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Tatamy's Place be forwarded to the Secretary's Office in furtherance of a land grant to Tundy Tetamy. Pennsylvania Land Records indicate that an August 10, 1733 survey of Tatamy's Place was certified by the surveyor and forwarded to the Secretary's Office on May 12, 1737, pursuant to the Warrant. (*Id.* ¶ 43 (citing, Pennsylvania Land Records, Survey Book A-24, Page 109).)

Tatamy's Place was granted to Tundy Tetamy by descendants of William Penn through the issuance of a valid Patent on April. 28, 1738 (the "First Tetamy Patent") (Patent Book A-8, Page 405), and was reaffirmed on January 22, 1741 (the "Second Tetamy Patent") (Patent Book A-9, Page 530), which together with the First Tetamy Patent collectively are referred to as the "Tetamy Patents." (*Id.* ¶ 44.)

The Tetamy Patents document Tundy Tetamy's fee simple ownership of Tatamy's Place. Chief Tundy Tetamy died in 1761 and is believed to be buried in the old cemetery at Forks U.C.C. Church. Neither he nor his heirs ever conveyed their interest in Tatamy's Place.

The first recorded instrument concerning Tatamy's Place following the Tetamy Patents is a duly recorded deed that purports to convey 318 acres and indicates that the land is known as Tatamy's Place. This conveyance is not a grant from Tundy Tetamy or his heirs. Rather, the conveyance is from Edward Shipper, the Executor of the Estate of William Allen, to Henry and Mathias Strecher. (*Id.* ¶ 46 (citing, Deed Book 2, at page 242),) The deed grant indicates that Mr. Allen purportedly agreed to sell the parcel to Melchior Strecher some forty years earlier, although no such conveyance is

evidenced by any written instrument. In fact, the Deed makes specific reference to the absence of an instrument that would have memorialized Mr. Allen's conveyance. As such, the Deed attempts to consummate an alleged transaction that transpired forty years earlier to benefit the heirs of the original grantee, Melchior Strecher.

No instrument exists that demonstrates any conveyance from Tundy Tetamy to Mr. Allen. There is no historical or official reference to any conveyance of Tatamy's Place from Tundy Tetamy or his heirs. There was no United States government approval of any Deed or other instrument from Tundy Tetamy or her heirs.

Historical and official records in the Commonwealth of Pennsylvania establish that through the Tetamy Patents, in 1738 and 1741, approximately 315 acres of land situated in what today is Forks Township, Northampton, County, Pennsylvania, was granted to Tundy Tetamy and his heirs, and that this land known as Tatamy's Place was never conveyed under authority of the United States of America.

II. STANDARD OF REVIEW

The purpose of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) is to test the legal sufficiency of a complaint. *Sturm v. Clark*, 835 F.2d 1009, 1011 (3d Cir. 1987). A complaint may be dismissed for failure to state a claim upon which relief may be granted if the facts pleaded, and reasonable inferences therefrom, are legally insufficient to support the relief requested. *Commonwealth ex. rel. Zimmerman v. Pepsico, Inc.*, 836 F.2d 173, 179 (3d Cir.

1988). In considering whether to dismiss a complaint, courts may consider those facts alleged in the complaint as well as matters of public record, orders, facts in the record and exhibits attached to a complaint. *Oshiver v. Levin, Fishbein, Sedran & Berman,* 38 F.3d 1380, 1391 (3d Cir. 1994). Courts must accept those facts, and all reasonable inferences drawn therefrom, as true. *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1983). Moreover, a complaint is viewed in the light most favorable to the plaintiff. *Tunnell v. Wiley,* 514 F.2d 971, 975 n.6 (3d Cir. 1975). In addition to these expansive parameters, the threshold a plaintiff must meet to satisfy pleading requirements is exceedingly low; a court may dismiss a complaint only if the plaintiff can prove no set of facts that would entitle him to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957)

III. DISCUSSION

The Delaware Nation, as Plaintiff in this matter, claims title to approximately 315 acres of ancestral land in the Commonwealth of Pennsylvania that was acquired by the Proprietors of Pennsylvania through the Walking Purchase of 1737. The disputed land, referred to as Tatamy's Place, is situated in Forks Township, Northampton County, Pennsylvania.[3] The Delaware Nation admits that Thomas

3. Plaintiff expressed to the Court that the most common English spelling of the specific tract of land at issue in this matter is referred to in historical documents as "Tatamy's Pace." We presume that this tract of land was not named until sometime after it was deeded to the Native American named Tundy Tetamy. Use of the property's name throughout this Court's discussion is for property identification purposes only, and we do not mean to imply any ownership rights.

Penn, together with other Proprietors, had sovereign authority to take the land that encompassed Tatamy's Place through the Walking Purchase, but argues that because the land was taken by deception, the tribe's aboriginal title was never validly extinguished.

A. Aboriginal Title

The concept of "aboriginal title" is defined by the United States Supreme Court as a right of occupancy to certain lands held by the Native Americans that is not recognized as ownership.[4] *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955).

1. Origins of Aboriginal Title

During Europe's exploration of North America, the European nations abided by the "doctrine of discovery." *Johnson v. McIntosh*, 21 U.S. 543, 588 (1823). The "doctrine of discovery" held that the discovering European nation received fee title to the discovered North American land

4. We find it unfortunate that courts continue to identify Native Americans as "Indians," as this term is both antiquated and offensive. "Indian" was the name Christopher Columbus mistakenly applied to the people he encountered when he arrived in what he believed was the "Indies," the medieval name for Asia. *See Webster's Ninth New Collegiate Dictionary* 613 (9th ed. 1991). Out of respect for the original inhabitants of this country, when possible, we identify these inhabitants as "Native Americans" unless specifically citing other sources. As much of the legal authority is referred to as "Indian law" and still uses the term "Indians," we acknowledge that the term "Indians" may be used in this memorandum to denote "Native Americans."

against all other European governments, subject to the Native Americans' right of occupancy and use. *Id.; see also, Seneca Nation of Indians v. New York,* 206 F. Supp. 2d 448, 504 (W.D.N.Y. 2002). Termed "aboriginal title," this right of occupancy and use arose in Native American tribes that inhabited lands from time immemorial. *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226, 233-34 (1985). Therefore, where a Native American tribe inhabited a discovered area from time immemorial, the discovering European nation and the tribe were subject to two parallel property interests: aboriginal title and fee title.

The aboriginal title holder had "a legal as well as a just claim to retain possession" of the land, but no independent power to convey his title. *Seneca,* 206 F. Supp. 2d at 503-04. The fee title holder to this same land would have both a right of preemption and an independent power to convey his title subject to aboriginal rights. *Id.* The fee title holder's right of preemption was similar to a contingent future interest in land that gave him the exclusive right to acquire the underlying Native American land should the tribe's aboriginal title be extinguished. *Id.* at 504.

2. Aboriginal Title may be Extinguished

a. Extinguishment By the Sovereign

It is undisputed that, the sovereign had the power to extinguish aboriginal title as a matter of law. (*See* Pl.'s Opp., Doc. No. 84, at 22; *see also* Defs.' Reply, Doc. No. 95, at 9.) When sovereigns discovered North American land, the rights of extinguishment and preemption were jointly held by the

discovering sovereign. *Mitchel v. United States,* 34 U.S. 711, 756 (1835); *see also Oneida Indian Nation of New York v. State of New York,* 691 F.2d 1070, 1075-76 (2d Cir. 1982); *Seneca,* 206 F. Supp. 2d at 504.

Upon acquiring fee title from the sovereign, however, the right of extinguishment did not automatically pass. *Oneida Indian Nation of New York v. City of Sherril, New York,* 337 F.3d 139, 154 (2d Cir. 2003). Individual fee title holders could not eject Native Americans with aboriginal title from their land absent some sovereign act. *Id.* (stating that extinguishment of aboriginal title requires sovereign consent); *see, e.g., Clark v. Smith,* 38 U.S. 195, 201 (1839); *Beecher v. Wetherby,* 95 U.S. 517, 525 (1877); *Fletcher v. Peck,* 10 U.S. 87, 142-43 (1810). The sovereign's right of extinguishment was an exclusive power, which the exercise thereof would terminate Native Americans' aboriginal title. *U.S. v. Alcea Band of Tillamooks,* 329 U.S. 40, 46 (1946).

b. Extinguishment At Will

Aboriginal title could be extinguished by the sovereign at will. *Id.* (stating the sovereign possessed exclusive power to extinguish the right of occupancy *at will)* (emphasis added). The right of extinguishment at will gave the discovering sovereign a sweeping authority to extinguish a Native American tribe's aboriginal title "by treaty, by sword, by purchase, by exercise of complete dominion adverse to right of occupancy, or otherwise." *See Oneida Indian. Nation of New York v. State of New York,* 520 F. Supp. 1278, 1293 (N.D.N.Y. 1981), *aff'd* in part, *rev'd* in part, 691 F.2d 1070 (2d.Cir. 1982).

c. Extinguishment 'Must be Intentional

Regardless of the means used to extinguish aboriginal title, "the relevant question is whether the governmental action was intended to be a revocation of Indian occupancy rights." *United States v. Gemmill,* 535 F.2d 1145, 1148 (9th Cir. 1976). The sovereign was empowered to terminate aboriginal title without restraint, and "[t]ermination of the right by sovereign action was complete and left the land free and clear of Indian claims." *Alcea Band of Tillamooks,* 329 U.S. at 46. In short, the extinguishment by the sovereign must have been intentional.

3. The Extinquishment of a Prior Sovereign is Nonjusticiable

The justness of a prior sovereign's decision to extinguish aboriginal title "is not open to inquiry in the courts." *See United States v. Santa Fe P. R. Co.,* 314 U.S. 339, 347 (1941) (citing *Beecher v. Wetherby,* 95 U.S. 517, 525 (1877)). The means by which a prior sovereign decided to extinguish aboriginal title raise a political question because the doctrine of discovery and the sovercign's authority thereunder precludes the existence of a judicially identifiable duty or a judicially determinable breach. *See Oneida Indian Nation v. State of New York,* 520 F. Supp. at 1324 (construing *Santa Fe P. R. Co.,* 314 U.S. at 347 (1941)); *see also United States v. Alcea Band of Tillamooks,* 329 U.S. 40, 63 (1946) (stating that the way a sovereign extinguished Indian title is a political matter). Thus, when aboriginal title is extinguished by the sovereign, it is beyond examination of the courts.

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B. The Walking Purchase Extinguished Aboriginal Title

1. The Delaware Nation Possessed Aboriginal Title

Plaintiff claims that it retains unextinguished aboriginal title to Tatamy's Place because Thomas Penn procured the land through fraud. Plaintiff contends that from time immemorial, The Delaware Nation has possessed aboriginal title. (Compl. ¶¶ 26, 38-40.) For purposes of these motions to dismiss, we take to be true Plaintiff's allegation that The Delaware Nation once possessed aboriginal title to Tatamy's Place.

2. The Walking Purchase was Executed by Proprietor Thomas Penn

Defendants argue that Plaintiff's Complaint alone establishes that the Charter vested the Crown's proprietary authority in the Penn family and that Thomas Penn in his capacity as a Proprietor extinguished The Delaware Nation's aboriginal title through the Walking Purchase of 1737. (*See Id.* Ex. A.; *Id.* ¶ 31.) Plaintiff does not contest that Thomas Penn and the other Proprietors of the time maintained sovereign authority to extinguish this aboriginal title.

3. Thomas Penn had the Sovereign Authority to Extinguish Aboriginal Title At Will

Plaintiff argues that actions taken and condoned by Thomas Penn in executing the Walking Purchase constituted fraud, and as such, were ineffective to extinguish Plaintiff's aboriginal title to Tatamy's Place. The Complaint alleges that

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Proprietor Thomas Penn engaged in the following deceitful practices to bring about The Delaware Nation's relinquishment of claims to Tatamy's Place. In implementing the Walking Purchase, Plaintiff alleges that Thomas Penn "falsely represented an old, incomplete, unsigned draft of a deed as a legal contract" to convince the Lenni Lenape to honor its terms, which deeded all land that could be covered in a day-and-a-half's walk, as purportedly agreed upon by their forefathers. (*Id.* ¶ 38.) Plaintiff further alleges that Thomas Penn executed the walk unfairly by hiring runners instead of walkers and by mapping a northwesterly route rather than a northern route as the treaty specified. (*Id.* ¶ 39.) The alleged runners of the Walking Purchase of 1737 procured 1,200 square miles of Lenni Lenape land in Pennsylvania. (*Id.*) Included in the land procured was land commonly referred to as the "Forks of the Delaware," which contained the parcel of land at the center of this dispute, "Tatamy's Place." (*See Id.* ¶¶ 37, 39, 40, 43.)

Plaintiff argues that extinguishment of aboriginal title can only occur through war or physical disposition, or by treaty. Plaintiff contends that it can prove that the Walking Purchase's deed was a forgery, and that the means by which it was executed were fraudulent. Plaintiff concludes that because fraud is not one of the delineated means by which aboriginal title may be extinguished, this Court must hold for purposes of these motions to dismiss that the Walking Purchase of 1737 did not validly extinguish aboriginal title.

Contrary to Plaintiff's legal argument, previously summarized in this memorandum, stands the sweeping authority allowing Thomas Penn to extinguish the Lenni

Lenape tribe's aboriginal title to Tatamy's Place. *See Alcea Band of Tillamooks,* 329 U.S. at 46 (stating the sovereign may extinguish aboriginal title "at will".); *see also, Oneida Indian Nation of New York v. State of New York,* 520 F. Supp. at 1293. Proof of fraud is not a material fact that would nullify Proprietor Thomas Penn's extinguishing act.

4. Thomas Penn Intended to Extinguish Aboriginal Title Through the Walking Purchase of 1737

Despite any deception that may have been employed to effectuate the Walking Purchase of 1737, the effect was to extinguish aboriginal title in the land acquired. The Complaint makes clear that Thomas Penn executed the Walking Purchase intending to rid the Lenni Lenape of its claims to land in Pennsylvania. (*See* Compl. ¶¶ 38, 39.) Included in the land procured was Tatamy's Place. (*See Id.* ¶¶ 37, 39, 40, 43.) Thus, the Complaint establishes that Thomas Penn had the requisite intent to effectuate a termination of The Delaware Nation's aboriginal rights that "left the land free and clear of Indian claims." *See Alcea Band of Tillamooks,* 329 U.S. at 46; *see also Gemmill,* 535 F.2d at 1148; *Seneca Nation of Indians v. New York,* 382 F.3d 245, 260 (2d Cir. 2004) (stating the requirement that intent to extinguish aboriginal title must be "plain and unambiguous" is applicable to Native American treaties negotiated by a prior sovereign).

The Walking Purchase of 1737 extinguished The Delaware Nation's aboriginal title to Tatamy's Place.

5. The Justness of Thomas Penn's Walking Purchase is Nonjusticiable

Proprietor Thomas Penn's decision to extinguish aboriginal title to Tatamy's Place was equivalent to that of the sovereign. Distinct from any non-governmental individual, Proprietor Thomas Penn's decision to extinguish aboriginal title "is not open to inquiry in the courts." *See Santa Fe P. R. Co.*, 314 U.S. at 347 (citing *Beecher*, 95 U.S. at 525); *see also Alcea Band of Tillamooks*, 329 U.S. at 63. Plaintiff has failed to plead a judicially determinable breach. *See Oneida Indian Nation v. State of New York*, 520 F. Supp. at 1324.

Plaintiff admits that Thomas Penn as a Proprietor of Pennsylvania was fully charged with the sovereign's proprietary authority. (Compl. ¶ 31.) Plaintiff further states that Thomas Penn initiated, oversaw, and, consequently, approved of the execution of the Walking Purchase. (*Id.* ¶¶ 38-39.) The Complaint even goes further to admit that the Lenni Lenape complained to the King of England about the execution of the Walking Purchase to no avail. (*Id.* ¶ 40.) Nevertheless, however vile Plaintiff chooses to depict the events of the Walking Purchase, Thomas Penn's justness cannot be questioned and the outcome in this matter cannot change. The Walking Purchase of 1737 extinguished aboriginal title to the lands acquired therein.

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C. The Trade and Intercourse Act and Federal Common Law Require Plaintiff to Allege a Transfer Involving "Tribal Land"

We have established that the extinguishment of aboriginal title in 1737 divested The Delaware Nation of all aboriginal land claims to Tatamy's Place. Without aboriginal title, Plaintiff fails to state a claim for which relief may be granted under the Act or federal common law. The only issue becomes whether Plaintiff has raised an issue of historical fact that aboriginal title was somehow revived.

Plaintiff brings its claims under the Trade and Intercourse Act of 1799 (the "Act"), 1 Stat. 743, 746 (1799),[5] and federal common law. Under both the Act and federal common law, Plaintiff must plead facts sufficient to, support its claim that it has an interest in the land in dispute because the land is "tribal land." Plaintiff agrees that "tribal land"' is a necessary and common element under the Act and federal common law. (*See* Pl.'s Opp., Doc. No. 84, p. 14; Compl. ¶ 159, 64.)

Courts have uniformly held that, in order to state a claim for violation of the Trade and Intercourse Act a plaintiff must

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5. Plaintiff correctly points out that the Court must apply the version of the statute in effect at the time of the transactions that allegedly dispossessed Plaintiff of its aboriginal right to possession of Tatamy's Place. Plaintiff alleges that The Delaware Nation was dispossessed of its aboriginal right on March 12, 1803 through the Allen Strecher deed. A review of the legislative history submitted by Plaintiff indicates that the 1799 version of the Act was enacted for a term of three years. Therefore, while inconsequential to our memorandum, the 1802 version of the Act would apply.

show that: (1) it is an Indian or Indian tribe; (2) the land in question is *tribal land;* (3) the United States never consented to or approved of the alienation of the land in question; and (4) the trust relationship between the United States and the tribe has not been terminated or abandoned. *See Golden Hill Pauqussett Tribe of Indians v. Weiker,* 39 F.3d 51, 56 (2d Cir. 1994) (emphasis added); *Epps v. Andrus,* 611 F.2d 915, 917 (1st Cir. 1979); *Catawba Indian Tribe v. South Carolina,* 718 F.2d 1291, 1295 (4th Cir. 1983); *Canadian St. Regis Mohawk Band of Mohawk Indians v. New York,* 146 F.Supp.2d 170, 185 (N.D.N.Y. 2001). Similarly, under federal common law, Native Americans have a right to sue to enforce their *aboriginal title* against trespassers on their land. *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226, 236 (1985) (emphasis added).

During oral argument, Plaintiff correctly stated that the element termed "tribal land" is necessary to his claims before the Court and that this term is synonymous with the term "Indian title," otherwise known as "aboriginal title." *See* Transcript p. 33, l. 5; *see also, Oneida Indian Nation of New York v. City of Sherrill, New York,* 337 F.3d at 152 (defining tribal land rights). In its papers, Plaintiff further argues that the Act does not limit its applicability to aboriginal title or fee title. These representations are consistent with our finding that whatever title Plaintiff asserts to have, the title must have aboriginal rights attached in order to survive dismissal under the Act and federal common law.

Plaintiff seems to argue that aboriginal title, once extinguished, can somehow be revived. Plaintiff contends that it can prove as a historical fact that when Tundy Tetamy

took fee title to Tatamy's Place he must have taken fee title for the benefit of all tribal members because The Delaware Nation did not recognize individual land ownership. (*See* Compl. ¶ 10.) Arguing that it has the legal right to prove a revival of aboriginal title through "way of life, habits, and customs and usages of Indians," Plaintiff relies on case law discussing unextinguished aboriginal title. *See, e.g., The Sac and Fox Tribe of Indians of Oklahoma v. United States,* 383 F.2d 991, 998 (Cl. Ct. 1967), *cert denied,* 389 U.S. 900 (1967); *Journeycake v. Cherokee Nation,* 28 Ct. Cl. 281, 302 (1893), *aff'd,* 155 U.S. 196 (1894).[6] "While the court generally must assume factual allegations to be true, it need not assume the truth of legal conclusions cast in the form of factual allegations." *United States ex rel. Chunie v. Rinarose,* 788 F.2d 638, 643 (9th Cir. 1986); *see also Cohen v. Litt,* 906 F. Supp. 957, 961 (S.D.N.Y. 1995). Unfortunately for Plaintiff, we find that the aboriginal right to possession, "once having been extinguished, could not be revived, even if title was thereafter acquired by those who originally possessed that right." *Tuscarora Nation of Indians v. Power Authority of New York,* 14 F. Supp. 107, 113 (W. D.N. Y. 1958).

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6. In apparent support of this argument, Plaintiff also relies on *Alonzo v. United States,* 249 F.2d 189, 197 (10th Cir. 1957), *cert. denied,* 355 U.S. 940 (1958). The facts of *Alonzo* are strikingly different than the facts before this Court. The court there imposed restrictions against alienation on Native Americans' fee titles even though these titles were deeded without restrictions. The basis for imposing these restrictions was not based not the Act, but, rather, on the terms of a particular statutory authority at issue relating to the Native Americans in that region. It is that statutory authority by which the Court reimposes land restrictions upon Native American land owners. Plaintiff's reliance on *Alonzo* to support its contention that the Act applies to Native. Americans possessing fee title alone is misplaced.

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Courts have uniformly held that the sovereign has the power "extinguish" aboriginal title. *See Mitchel,* 34 U.S. at 756; *see also Oneida Indian Nation of New York v. State of New York,* 691 F.2d at 1075-76. Webster's Ninth New Collegiate Dictionary provides the following relevant definitions for the word "extinguish:" "to bring to an end;" and "to cause extinction. *Webster's Ninth New Collegiate Dictionary* 440 (9th ed. 1991). Further, "[t]o hold that all land held by Indians to Tribes should be restricted . . . would be a regressive step toward regarding the relationship of the United States to Indians as that of 'guardian to ward.'" *United States ex rel. Saginaw Chippewa Tribe v. Michigan,* 882 F. Supp. 659, 675 (E.D. Mich. 1995) (quoting *Catawba Indian Tribe,* 718. F.2d at 1298-99). It is reasonable to conclude, as the court did in *Tuscarora Nation of Indians* that aboriginal title, once extinguished, is forever lost.

Similar to the facts before us, the district court in *Tuscarora Nation of Indians* faced the unique situation where the plaintiff Native American tribe purchased land, rather than having it ceded to the tribe. The plaintiff tribe acquired title at some point after the sovereign's right to preemption perfected into full fee title. The court expressed that the obvious policy of the Great Britain was to extinguish aboriginal title to all but reserved lands. The court found that "if the fee is not in the state, then it is privately held." *Id.* at 115. The court in *Tuscarora* further held that "it cannot be argued that original Indian title can in any manner, be revived once it has been extinguished." *Id.* 113. We find this reasoning compelling and applicable to the facts before us.

Therefore, tribal land rights may not be revived, and without any tribal land rights in Tatamy's Place, Plaintiff fails to state a claim for which relief may be granted under the Act or federal common law.

IV. CONCLUSION

By 1741, aboriginal title to Tatamy's Place had been extinguished, and Tundy Tetamy alone owned the land in fee. Plaintiff does not point to any subsequent legally cognizable facts indicating a sovereign grant of tribal land in Tatamy's Place. As Tatamy's Place is not tribal land, Plaintiff does not have any legally-protectable interest in Tatamy's Place under the Act or federal common law. The Defendants' Motions to Dismiss are **GRANTED.**

Appendix C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 04-CV-166

THE DELAWARE NATION,

Plaintiff,

v.

COMMONWEALTH OF PENNSYLVANIA, et al.,

Defendants.

ORDER

AND NOW, this 30th day of November 2004, in consideration of the nine Motions to Dismiss filed by the following groups of defendants: (1) Jack and Jean Reese (Doc. No. 55), (2) Forks Township, John Ackerman, David Kolb, Donald H. Miller, David W. Hof, and Henning Holmgaard (Doc. No. 56), (3) Binney & Smith, Inc., the Follett Corporation, Carol A. Migliaccio, Nic Zawarski and Sons Developers Inc., Daniel O. Lichtenwalner, and Joan B. Lichtenwalner (the "Binney & Smith defendants") (Doc. No. 57), (4) the Commonwealth of Pennsylvania (Doc. No. 58), (5) Audrey Baumann (Doc. No. 60), (6) W. Neill Werkheiser, Warren F. Werkheiser, Carl W. and Gail N. Roberts, Robert

and Mary Ann Aerni, and Mark and Cathy Sampson (Doc. No. 62), (7) the County of Northampton, Pennsylvania and the nine members of Northampton County Council in their official capacity, who are named as J. Michael Dowd, Ron Angle, Michael F. Corriere, Mary Ensslin, Margaret Ferraro, Wayne A. Grube, Ann McHale, Timothy B. Merwarth and Nick R. Sabatine, (Doc. No. 63), (8) the Honorable Edward G. Rendell (Doc. No. 64), and (9) the County of Bucks, Pennsylvania (Doc. No. 66) (collectively, the "Defendants")' requesting that this Court dismiss Plaintiff The Delaware Nation's ("Plaintiff") Complaint against the Defendants pursuant to Federal Rule of Civil Procedure 12(b)(6) for Plaintiff's failure to plead facts sufficient to support a claim to the parcel of land at the center of this dispute; Plaintiff's Responses to the Motions to Dismiss (Doc. Nos. 84, 85, 86, 87, 88, 89,90, 91, & 92); the Defendants' Replies (Doc. Nos. 93, 94, 95, & 101); and Plaintiff's Sur-Reply thereto (Doc. No. 105).

And in further consideration of the October 6, 2004 oral argument and the parties' responsive papers thereto (Doc. Nos. 110, 111, 112, 113, & 114), **IT IS ORDERED** that:

1. By stipulation of the parties, the Motions of the following Defendants are **DISMISSED AS MOOT**:

a. the Commonwealth of Pennsylvania's (Doc. No. 58); and

b. the County of Bucks, Pennsylvania (Doc. No. 66).

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2. The Motions of the following groups of Defendants are **GRANTED**:

a. Jack and Jean Reese (Doc. No. 55);

b. Forks Township, John Ackerman, David Kolb, Donald H. Miller, David W. Hof, and Henning Holmgaard (Doc. No. 56);

c. Binney & Smith, Inc., the Follett Corporation, Carol A. Migliaccio, Nic Zawarski and Sons Developers Inc., Daniel O. Lichtenwalner, and Joan B. Lichtenwalner (Doc. No. 57);

d. Audrey Baumann (Doc. No. 60);

e. W. Neill Werkheiser, Warren F. Werkheiser, Carl W. and Gail N. Roberts, Robert and Mary Ann Aerni, and Mark and Cathy Sampson (Doc. No. 62);

f. the County of Northampton, Pennsylvania and the nine members of Northampton County Council in their official capacity, who are named as J. Michael Dowd, Ron Angle, Michael F. Corriere, Mary Ensslin, Margaret Ferraro, Wayne A. Grube, Ann McHale, Timothy B. Merwarth and Nick R. Sabatine, (Doc. No. 63); and

g. the Honorable Edward G. Rendell (Doc. No. 64).

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The Clerk of Court **SHALL** enter judgment in favor of the Defendants and against Plaintiff The Delaware Nation.

BY THE COURT:

s/ James McGirr Kelly
JAMES McGIRR KELLY, J.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED JUNE 15, 2006

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-4593

THE DELAWARE NATION, A FEDERALLY RECOGNIZED INDIAN TRIBE, IN ITS OWN NAME AND AS THE SUCCESSOR IN INTEREST TO "MOSES" TUNDY TETAMY, A FORMER CHIEF OF THE DELAWARE NATION, AND OF HIS DESCENDANTS

v.

COMMONWEALTH OF PENNSYLVANIA; EDWARD G. RENDELL; COUNTY OF NORTHAMPTON, PENNSYLVANIA; J. MICHAEL DOWD; RON ANGLE; MICHAEL F. CORRIERE; MARY ENSSLIN; MARGARET FERRARO; WAYNE A. GRUBE; ANN MCHALE; TIMOTHY B. MERWARTH; NICK R. SABATINE; COUNTY OF BUCKS, PENNSYLVANIA; MICHAEL G. FITZPATRICK; CHARLES H. MARTIN; SANDRA A. MILLER; TOWNSHIP OF FORKS, PENNSYLVANIA; JOHN ACKERMAN; DAVID KOLB; DONALD H. MILLER; DAVID W. HOFF; HENNING HOLMGAARD; BINNEY & SMITH, INC.; FOLLETT CORPORATION; ROBERT AERNI; MARY ANN AERNI; AUDREY BAUMAN; DANIEL O. LICHTENWALNER; JOAN B. LICHTENWALNER; CAROL A. MIGLIACCIO; JOSEPH

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M. PADULA; MARY L. PADULA; JACK REESE; JEAN REESE; ELMORE H. REISS; DOROTHY H. REISS; GAIL N. ROBERTS; CARL W. ROBERTS; WARREN F. WERKHEISER; ADA A. WERKHEISER; WARREN NEILL WERKHEISER; NICK ZAWARSKI AND SONS DEVELOPERS INC.; JOHN DOES 1-250; JOHN DOE COMPANY; MARK SAMPSON; CATHY SAMPSON

The Delaware Nation,

Appellant

Before: SCIRICA, *Chief Judge*, SLOVITER, MCKEE, BARRY, AMBRO, FUENTES, SMITH, CHAGARES, GARTH[1] and ROTH[2], *Circuit Judges*

ORDER

The petition for rehearing *en banc* filed by the Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is **denied**.

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1. Honorable Leonard I. Garth, who sat on the original panel, is limited to panel rehearing only.

2. Effective May 31, 2006, Judge Roth assumed senior status.

Appendix D

By the Court,
/s/ Jane R. Roth
Circuit Judge

Dated: June 15, 2006
LML/cc: Counsel of Record

(2)

No. 06-364

FILED
OCT 11 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

THE DELAWARE NATION,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF BINNEY & SMITH, INC., THE FOLLETT CORPORATION, CAROL A. MIGLIACCIO, NIC ZAWARSKI AND SONS DEVELOPERS INC., DANIEL O. LICHTENWALNER, AND JOAN B. LICHTENWALNER IN OPPOSITION

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Counter-Statement of the Questions Presented

1) Did the Court of Appeals properly find that Petitioner, the Delaware Nation, failed to make out the elements of an Indian Nonintercourse Act claim, thereby negating the need to determine whether the Act applies to land granted in fee to an individual Indian?

2) Did the Court of Appeals properly find that aboriginal title was extinguished by the Province of Pennsylvania?

List of Parties and Rule 29.6 Statement

The petitioner is the Delaware Nation, a federally recognized Indian tribe. Respondents are Governor Edward G. Rendell, the County of Northampton, Pennsylvania, J. Michael Dowd, Ron Angle, Michael F. Corriere, Mary Ensslin, Margaret Ferraro, Wayne A. Grube, Ann McHale, Timothy B. Merwarth, Nick R. Sabatine, the Township of Forks, Pennsylvania, John Ackerman, David Kolb, Donald H. Miller, David W. Hoff, Henning Holmgaard, Binney & Smith, Inc., the Follett Corporation, Robert Aerni, Mary Ann Aerni, Audrey Bauman, Daniel O. Lichtenwalner, Joan B. Lichtenwalner, Carol A. Migliaccio, Jack Reese, Jean Reese, Gail N. Roberts, Carl W. Roberts, Warren F. Werkheiser, Warren Neill Werkheiser, Nic Zawarski and Sons Developers, Inc., Mark Sampson, and Cathy Sampson.

The parent corporation of respondent Binney & Smith, Inc. is Hallmark Cards, Incorporated, which owns 100 percent of H.A., Inc., which in turn owns 100 percent of Binney & Smith, Inc. No publicly held company owns 10 percent or more of the stock of Hallmark Cards, Incorporated.

Respondent Follett Corporation has no parent corporation, and no publicly held company owns 10 percent or more of the stock of the Follett Corporation.

Respondent Nic Zawarski and Sons Developers, Inc. has no parent corporation, and no publicly held company owns 10 percent or more of the stock of Nic Zawarski and Sons Developers, Inc.

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IN THE
SUPREME COURT OF THE UNITED STATES
No. 06-364

DELAWARE NATION,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, et al.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF BINNEY & SMITH, INC., THE FOLLETT CORPORATION, CAROL A. MIGLIACCIO, NIC ZAWARSKI AND SONS DEVELOPERS INC., DANIEL O. LICHTENWALNER, AND JOAN B. LICHTENWALNER IN OPPOSITION

Opinions Below

The opinion of the district court was entered on November 30, 2005 and unreported. The opinion of the Court of Appeals was entered on May 4, 2006 and is reported at 446 F.3d 410. The Court of Appeals denied rehearing on June 15, 2006.

Jurisdiction

The judgment of the Court of Appeals was entered on May 4, 2006. A petition for rehearing was denied on

June 15, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statement

Petitioner, the Delaware Nation, is a federally recognized Indian tribe now located in Oklahoma. In the courts below, Petitioner alleged that the Walking Purchase of 1737, a well-known event in Pennsylvania history, failed to extinguish the tribe's aboriginal title to approximately 1,200 square miles of eastern Pennsylvania, including the land at issue in this suit. The land at issue consists of 315 acres of land purchased in 1741 by an individual Indian, Tatamy, from the Proprietors of Pennsylvania—or "Proprietaries" in the usage of the time. Petitioner also claimed to be the fee owner of the 315-acre Tatamy parcel, even though the 1741 patent from the Proprietaries of Pennsylvania granting the land to Tatamy was clearly on its face a grant to an individual, rather than to a tribe. *See* Pet. App. 5a-7a.

In 1737, Thomas Penn, in his capacity as successor to his father William Penn as the Proprietor of Pennsylvania, extinguished the Petitioner's aboriginal title to approximately 1,200 square miles of eastern Pennsylvania through the infamous Walking Purchase. *See* Pet. App. 4a-5a. The 315-acre parcel claimed by Petitioner was part of the land included in the Walking Purchase. After the Walking Purchase, the Proprietaries sold the 315 acre parcel to an individual member of the Delaware tribe, Tatamy, who was a well-known and respected figure. *See* Pet. App. 5a; *see also* James H. Merrell, INTO THE AMERICAN WOODS (1999) at 88 & 292 (Tatamy was one of a few Delaware Indians who ultimately became a Christian and "to one degree or another accepted European ways."); William A. Hunter, *Moses (Tunda) Tatamy, Delaware Indian Diplomat*

(Pennsylvania Historical and Museum Commission 1974). The first patent to Tatamy, dated April 28, 1738, was cancelled and replaced by the second patent, dated January 22, 1741. The 1741 Patent granted the land in fee simple to "Tatamy and his heirs and assigns." *See* Pet. App. 5a-6a; Complaint, Exhibit F (1741 Patent). In a deed recorded on March 12, 1803, Edward Shipper, as Executor of the Estate of William Allen, conveyed the 315-acre parcel to the Strecher family, reciting an agreement between Allen and the Strechers forty years prior to Allen's death.[1] The record below does not show how Allen acquired Tatamy's title.[2]

The landowner defendants, respondents here, or their predecessors in title have held undisputed title to and possession of the 315 acres claimed by Petitioner for roughly 200 years, until this present suit was filed. The landowner defendants—homeowners and three businesses—are innocent purchasers who had no involvement in any of the events that led to the Delaware Nation's departure from Pennsylvania during colonial times.

In the district court the respondents moved to dismiss for failure to state a claim.[3] Following briefing and oral

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1 *See* Pet. App. 6a-7a. William Allen was the Chief Justice of Pennsylvania and vouched for Tatamy as part of the process by which Tatamy received his patent. *See* Complaint, Exhibit B.

2 *See* Pet. App. 7a. The historian James Merrill states that "Tatamy sold his land sometime before 14 February 1757." *See* James H. Merrell, INTO THE AMERICAN WOODS (1999) at 429-30 n.152.

3 Respondents Binney & Smith, Inc., the Follett Corporation, Daniel O. and Joan B. Lichtenwalner, Carol A. Migliaccio, and Nic Zawarski and Sons Developers Inc. ("the Binney & Smith Defendants") although not related parties, have counsel in common

argument, the district court, on November 30, 2004, granted the motions to dismiss. On December 1, 2004, it entered final judgment on its Order. Plaintiff timely appealed.

On appeal, the court of appeals affirmed the dismissal, holding that any aboriginal rights held by the Delaware Nation to the claimed land were extinguished by the Walking Purchase of 1737, and that the Delaware Nation does not hold fee title to the claimed land.

Argument

The decision below is correct. It does not present a question of federal law deserving the Court's attention. Furthermore, the decision below does not conflict with any decision of this Court or any court of appeals. Therefore further review is not warranted.

I. The application of the Nonintercourse Act of 1799 does not present a question of federal law deserving the Court's attention.

Petitioner seeks review to enable this Court to consider whether the Nonintercourse Act of 1799 applied to land held in fee by an Indian tribe.[4] Resolution of that issue would be purely academic for purposes of this case, however, and would not benefit Petitioner. The court of appeals below assumed arguendo that the Act did apply to land held in fee by an Indian tribe. *See* Pet. App. 13a-14a.

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and filed a joint motion to dismiss in the district court, and have continued to file joint briefs in the court of appeals and in this Court.

[4] Nonintercourse Act of 1799, Act of March 3, 1799, c. 46, § 12, 1 Stat. 743, 746. The current version of the Nonintercourse Act is codified at 25 U.S.C. § 177.

The court of appeals below then determined that the applicability of the Nonintercourse Act was irrelevant because Petitioner did not own the land it claims in fee. Instead, the land was owned by an individual, Tatamy. The court of appeals stated:

> Even assuming that the Nonintercourse Act applies to land reacquired by an Indian tribe in fee after the sovereign extinguished its aboriginal rights to land—an issue which appears to be unsettled, but which is not necessary for us to decide here—the Delaware Nation's claim must fail because it is clear that the Proprietors granted Tatamy's Place to Chief Tatamy in his individual capacity, and not as an agent of the tribe.

See Pet. App. 13a-14a. Consequently, resolution of the question whether the Nonintercourse Act of 1799 applies to land reacquired by a tribe in fee would not change the result in this case. The decision below would be affirmed whether or not the Act applies, because the court of appeals determined that "the land in question is not 'tribal' in any sense of that word." *See* Pet. App. 17a. Consideration of the question whether the Nonintercourse Act of 1799 applies to land reacquired by a tribe in fee, if it is to occur at all, should await a case in which the resolution of the question would make a difference to the outcome.[5]

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[5] Courts, including this Court, have indicated that the Nonintercourse Act prohibits a tribe from alienating or encumbering land held by the tribe in fee simple. *See Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 244-46 (1985)(Nonintercourse Act applied to land held in fee by Pueblos in New Mexico); *United States v. Candelaria*, 271 U.S. 432, 441-42 (1926) (Nonintercourse Act applied to land held in fee by Pueblos in New Mexico); *Tonkawa Tribe of Oklahoma v. Richards*, 75 F.3d

In truth, Petitioner seeks to overturn the court of appeals' determination that the "land in question is not tribal." That is not, however, the question for review that Petitioner posed. Furthermore, the court of appeals below was correct when it concluded that the Delaware Nation had no fee title to the Tatamy parcel. The 1741 Patent clearly grants the land in fee simple to "Tatamy and his heirs and assigns," rather than to any Indian tribe. *See* Complaint, Exhibit F (1741 Patent). Petitioner conceded

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1039, 1045 (5th Cir. 1996)(Nonintercourse Act protects land purchased by a tribe); *Tuscarora Nation of Indians v. Power Authority*, 257 F.2d 885, 887, 893 (2d Cir.), *cert. denied*, 358 U.S. 841 (1958) (Nonintercourse Act applies to land purchased by a tribe); *United States v. 7,405.3 Acres of Land*, 97 F.2d 417 (4th Cir. 1938)(same); *Jicarilla Apache Tribe v. Board of County Commissioners, County of Rio Arriba*, 118 N.M. 550, 883 P. 2d 136 (N.M. 1994)(same). In *Lummi Indian Tribe v. Whatcom County*, the Ninth Circuit held that "parcels of land approved for alienation by the federal government and then reacquired by the Tribe did not then become inalienable by operation of the Nonintercourse Act." *See Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355, 1358-59 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228 (1994); *see also San Xavier Developmental Authority v. Charles*, 237 F.3d 1149 (9th Cir. 2001)(Nonintercourse Act applies only to tribal land, not allotted land); *Leech Lake Band of Chippewa Indians v. Cass County*, 908 F. Supp. 689 (D. Minn. 1995), *reversed on other grounds*, 108 F.3d 820 (8th Cir. 1997)(court finds it unnecessary to consider any issue related to the Nonintercourse Act), *reversed*, 524 U.S. 103 (1998)(Court finds it unnecessary to consider any issue related to the Nonintercourse Act); *United States v. Michigan*, 882 F. Supp. 659 (E.D. Mich. 1995), *reversed on other grounds*, 106 F.3d 130 (6th Cir. 1997)(court did not consider Nonintercourse Act), *vacated for consideration in light of Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998). In *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998), this Court found it unnecessary to consider whether the Nonintercourse Act applied to land rendered alienable by Congress and later reacquired by a tribe in fee. *See Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 115 n.5 (1998).

that the 1741 Patent represents a grant to Tatamy in fee simple. *See* Complaint, ¶ 45. The 1741 Patent recites that the land was granted to Tatamy "for a Settlement and Place of Abode for him and his children under a certain Quit rent and other reservations, Conditions and Limitations." *See* Complaint, Exhibit F (1741 Patent). The 1741 Patent provides that Tatamy was to pay one-half penny sterling for every acre annually as quitrent, and reserves a right of reentry on behalf of the Proprietors to take possession of the land to secure the payment of the quitrent. The inclusion of a provision for quitrent demonstrates that the 1741 Patent to Tatamy was intended by the Proprietaries as a typical fee simple grant to an individual rather than as a tribal grant.

The 1741 Patent also recites that Tatamy and his heirs and assigns held the land "in free and common Soccage by fealty only in lieu of all other services." It then recites that Tatamy paid 48 pounds, sixteen shillings, sixpence to receive a fee simple grant to the 315 acre parcel. *See* Complaint, Exhibit F (1741 Patent). These provisions in the 1741 Patent all establish that the 1741 Patent was a grant to an individual, rather than to a tribe.[6]

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[6] Petitioner apparently continues to rely upon an earlier patent covering the same the 315 acre parcel issued to Tatamy in 1738. *See* Pet. at 6. The 1741 Patent states expressly that the 1738 Patent was cancelled by the 1741 Patent. *See* Complaint, Exhibit F (1741 Patent). Petitioner therefore cannot assert any claim under the 1738 Patent. In any event, like the 1741 Patent, the 1738 Patent is also on its face a grant to an individual, rather than to a tribe. *See* Complaint, Exhibit E (1738 Patent). None of the provisions in the 1738 Patent gives any indication that the grant was intended by the Proprietaries to constitute a grant to a tribe. The 1738 Patent provided that the grant was to Tatamy for his natural life and the lives of his child or children "to all generations," but also provided that if Tatamy died without any children surviving, then the land would revert to the Proprietaries. The 1738 Patent also provided that the land would revert to the Proprietaries if Tatamy or his heirs should "desert" the land for a year.

Certainly none of its provisions gives any indication that the grant was intended by the Proprietaries to constitute a grant to a tribe.

The court of appeals' construction of the 1741 Patent is confirmed by a ruling of the Commonwealth's Board of Petition made on November 20, 1742 in response to a petition by Tatamy and others. Shortly after a July 12, 1742 treaty between Pennsylvania and the tribes of the Six Nations that included a provision directing the Delaware tribe to leave the area, Tatamy and several other Delaware Indians sought to stay behind when the Delaware tribe moved west in compliance with the 1742 treaty. The Governor of Pennsylvania submitted Tatamy's petition and the others to the Board of Petition. The Board's minutes recite that Tatamy and the others, "having embraced the Christian religion and attained some degree of knowledge therein, they are desirous of living under the same Laws with the English, and praying that some place might be allotted them where they may live in the Enjoyment of the same Religion & Laws with them." *See* IV MINUTES OF THE PROVINCIAL COUNCIL, at 624. The Board, however, initially determined that the real purpose of the petitions "was to evade the force of the Injunctions laid on them at the said Treaty by the Chiefs of the Six Nations, who had commanded all the Delaware Indians without exception to remove from the Lands on Delaware

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The 1738 Patent also contained a quitrent clause providing that Tatamy was to pay one-half penny sterling for every acre annually as quitrent, and if the quitrent was not paid within the time allowed, the land would revert to the Proprietaries. *See* Complaint, Exhibit E (1738 Patent). These provisions in the 1738 Patent providing for reversion of title if no children survive and if the land is abandoned, and providing for reentry for failure to pay quitrent, are completely inconsistent with a grant of tribal title. Therefore, there is nothing about the 1738 Patent to suggest that the 1741 Patent was intended in any way to be a tribal grant.

where they then dwelt, and which their ancestors had twice sold to the Proprietors, back to Wyomin or Shamokin." *See* IV MINUTES OF THE PROVINCIAL COUNCIL, at 624-25. The Board then rejected the petitions, stating that "it is by no means fit to comply with the general Pray'r of the said Petition, for that it might not only be resented by the six Nations, but be a means of reviving the Dissentions lately fomented by the Delawares." *See* IV MINUTES OF THE PROVINCIAL COUNCIL, at 625.

When Tatamy reminded the Board that he "was lawfully possessed of three hundred acres of Land by a Grant from the Proprietor; and that he was desirous of continuing to live there in Peace and friendship with the English," and another Indian named Captain John made a representation that he would similarly buy land if permitted, the Board then ruled that Tatamy and Captain John alone could stay behind. "But if these two men [Tatamy and Captain John] could obtain the consent of the six Nations for them to remain amongst the English, it might be granted them." IV MINUTES OF THE PROVINCIAL COUNCIL, at 625. The Board made it clear, however, that Tatamy's and Captain John's right to remain did not extend to any Delaware Indians other than "themselves and their proper families dwelling in the same Houses with them." The Board stated:

> And they [Tatamy and Captain John] were to understand that the other Petitioners were by no means to be included in this permission, nor any other of the Delaware Indians, whom they called their Cousins, nor any besides

> themselves and their proper families dwelling in the same Houses with them.[7]

These actions by the Board of Petition in November of 1742, coming so soon after the 1741 Patent to Tatamy and the July 1742 treaty with the Six Nations, demonstrate that the 1741 Patent did not constitute a grant to a tribe. The 1742 decision of the Board of Petition made it absolutely clear that the Delaware Indians, apart from Tatamy and Captain John and their immediate families, had no right to remain on any land at the Forks. The 1741 Patent was clearly a grant to Tatamy the individual, not to the Delaware tribe.

In sum, the court of appeals below assumed arguendo that the Nonintercourse Act of 1799 applied to land as to which aboriginal title is extinguished and that is subsequently reacquired in fee by an Indian tribe. The court determined, however, that Petitioner did not own the Tatamy parcel in fee. Consequently, resolution of the question whether the Nonintercourse Act applies to land to which aboriginal title is extinguished but later is reacquired in fee by an Indian tribe would not change the result in this case. This Court should not grant certiorari to review a question that has no bearing on the result in this case.

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[7] *See* IV Minutes of the Provincial Council, at 625; *see also* William A. Hunter, *Moses (Tunda) Tatamy, Delaware Indian Diplomat* (Pennsylvania Historical and Museum Commission 1974).

II. The determination by the court of appeals below that Petitioner waived its argument that the Proprietaries of Pennsylvania lacked the sovereign power to extinguish aboriginal title does not present a question of federal law deserving the Court's attention.

Petitioner also seeks review of the determination of the court of appeals below that Petitioner waived its argument that the Proprietaries of Pennsylvania lacked the sovereign power to extinguish aboriginal title. The court of appeals below made a straightforward application of the waiver doctrine and determined that Petitioner had not presented its argument to the district court. This issue does not deserve the Court's attention.

A. Petitioner's aboriginal title to the Tatamy parcel was extinguished by the Proprietaries of Pennsylvania, exercising the sovereign power conveyed by the Charter of 1681.

The courts below correctly held that Petitioner's aboriginal title to the Tatamy parcel was extinguished by the events comprising the so-called Walking Purchase of 1737. *See* Pet. App. 11a. As a matter of well-settled law the sovereign has the absolute power to extinguish aboriginal title, by any means. *See United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 347 (1941). As Justice Douglas phrased it in one of the leading cases on the extinguishment of aboriginal title: "And whether it [extinguishment of aboriginal title] be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts." *Id.* The Proprietaries of Pennsylvania, exercising the sovereign power conveyed to them by the Charter of 1681, clearly intended to extinguish Delaware aboriginal title through

the Walking Purchase in 1737. So long as the sovereign clearly intended to extinguish aboriginal title by its actions, the means chosen by the sovereign to accomplish extinguishment are completely irrelevant to the question of whether title was in fact extinguished. *See id.*

B. Petitioner waived its argument that the Proprietaries of Pennsylvania lacked the sovereign power to extinguish aboriginal title.

On appeal Petitioner attempted to argue, for the first time in the litigation, that William Penn and his sons, as Proprietaries of Pennsylvania under the Charter of 1681, lacked the sovereign authority to extinguish aboriginal title. Respondents argued, and the court of appeals agreed, that Petitioner had waived the argument. Respondents demonstrated that the Governor's Reply (Docket No. 94) had argued at pp. 4-5 that the Walking Purchase was valid precisely because Thomas Penn was sovereign. Indeed, the Governor's Reply contained a footnote 1 that explicitly stated:

> The Penns' status as sovereign, with the power to extinguish aboriginal title, *is of course undisputed. See* Compl. at ¶ ¶ 28-37; opp. at 5-6.

Governor's Reply, p. 4 n.1 (emphasis added). Petitioner said not one word in response to this unambiguous statement. Petitioner did not even attempt to argue against the Penns' status as sovereign. Rather, in a section of the Sur-Reply captioned "The Delaware Nation Was Never Dispossessed of Tatamy's Place," Petitioner argued only that the Walking Purchase was fraudulent, and that "aboriginal title cannot be validly extinguished through fraud and chicanery." *See* Plaintiff's Sur-Reply in Opposition to Defendants' Motion to Dismiss (Docket No. 104), p. 2.

Petitioner's answers to the district court's written questions to all parties (Docket No. 114) further established that this argument was not made below. In response to Question 5(b), "did the Walking Purchase of 1737 extinguish the Delaware Nation's aboriginal title?" Petitioner responded: "Because Indian title can only be extinguished by the sovereign, the Walking Purchase could not have validly extinguished Indian title to Tatamy's Place where the Walking Purchase was the product of fraud. Fraud is not a valid form of extinguishment." Had Petitioner intended to raise Thomas Penn's purported lack of sovereignty as an issue, one certainly would have expected it to be raised here. The complete absence of any reference to Thomas Penn's alleged lack of sovereignty, in response to the district court's question and the Governor's direct statement, establishes beyond doubt that the argument was not raised below. The court of appeals was fully justified in determining that Petitioner had waived the argument.

C. The Indian burden of proof statute, 25 U.S.C. § 194, is irrelevant to Petitioner's waiver.

Petitioner claims that the court of appeals' straightforward application of procedural waiver to its argument that the Proprietaries of Pennsylvania lacked sovereign authority to extinguish aboriginal title somehow conflicts with 25 U.S.C. § 194, which deals with the burden of proof in trials between an "Indian" and a "white person." *See* 25 U.S.C. § 194; *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 658 (1979). Section 194 has no bearing on Petitioner's waiver, however. Section 194 shifts the burden of proof and the burden of persuasion in a trial from an Indian to a non-Indian once the Indian "has made out a presumption of title in himself." *See* 25 U.S.C. § 194. This case, however, was decided on a motion to dismiss under Rule 12(b)(6), in which all of Petitioner's factual allegations were presumed to be true.

Defendants established, as a matter of law, that the Proprietaries of Pennsylvania in 1737 extinguished any aboriginal title that Petitioner may have had. The burden of proof was not implicated in the decisions of the courts below.

Petitioner's argument that the Proprietaries of Pennsylvania lacked sovereign authority to extinguish aboriginal title in 1737 is a legal argument, not a factual assertion. Petitioner failed to raise the argument in a timely fashion, the court of appeals was fully justified in finding waiver, and section 194 has no bearing on the issue. Furthermore, the application of section 194 to a procedural waiver appears to be an issue that is unlikely to recur often and therefore does not deserve the Court's attention.

D. In any case, the Proprietaries of Pennsylvania had sovereign authority to extinguish aboriginal title.

There can be no doubt that the Charter of 1681, attached to the Complaint as Exhibit A and cited liberally in the Complaint, granted to William Penn and his "Heires and Assignes" as the "true and absolute Proprietarie" of Pennsylvania, the sovereign authority to extinguish aboriginal title. The Charter of 1681 represents an extensive delegation of governmental authority from the ultimate sovereign, the King of England, to William Penn and his successors as Proprietaries, authorizing the Proprietaries to govern Pennsylvania. For example, the Charter explicitly grants to the Proprietaries "full and absolute power" (1) to ordain and publish "any Laws whatsoever," (2) to "appoint and establish any Judges and Justices," (3) to divide Pennsylvania into counties, towns and boroughs, (4) to establish seaports and harbors for the importation of goods and collections of customs duties, and (5) even the power to raise armies and "make Warre." *See* Complaint, Exhibit A at A59-66. The Charter also

explicitly grants to William Penn, and his heirs and assigns, "full and absolute power, license, and authoritie" to grant land in fee simple, and binds the King of England and his successors to recognize any titles to land granted by Penn and his successors that "as to him, the said William Penn, his heires and assignee, shall seem expedient." *See* Complaint, Exhibit A.

This Court has repeatedly held that proprietary charters, such as the 1681 Charter to William Penn, conveyed to the proprietors both the sovereign power to govern and the right to convey private title to land. *See Howard v. Ingersoll*, 54 U.S. 381, 400 (1852)("In proprietary governments the right of soil as well as jurisdiction was vested in the proprietors."); *Martin v. Waddell*, 41 U.S. 367, 412 (1842); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 580-81, 603 (1823). In construing a similar charter for New York and New Jersey, issued by Charles II to the Duke of York, the Court in *Martin v. Waddell* stated:

> [W]e can entertain no doubt as to the true construction of these letters-patent. The object in view appears upon the face of them. They were made for the purpose of enabling the Duke of York to establish a colony upon the newly-discovered continent, to be governed, as nearly as circumstances would permit, according to the laws and usages of England; and in which the duke, his heirs and assigns, were to stand in the place of the king, and administer the government according to the principles of the British constitution.

See Martin v. Waddell, 41 U.S. 367, 412 (1842)(emphasis added). Petitioner's argument that William Penn and his successors were merely private landowners who "could convey fee title to others" but who lacked the authority to extinguish aboriginal title ignores the fundamental

purpose of the Charter of 1681, which was to delegate the power to govern Pennsylvania—"to stand in the place of the king"—to William Penn and his successors.[8] The Charter of 1681 granted the sovereign authority over Pennsylvania to William Penn and his successors, and the Proprietaries had full authority to extinguish aboriginal title to land in Pennsylvania.

Furthermore, Petitioner's argument proves too much because it would invalidate existing land titles to virtually all of the land in Pennsylvania, including land purchased from Native Americans by William Penn himself. It is clear from the Charter of 1681 that William Penn's successors as Proprietaries had the same authority as William Penn himself did. If, as Petitioner contends, only the King could extinguish aboriginal title to the land comprising the Walking Purchase, then William Penn could not have obtained a valid title in connection with any of the purchases that he made, either. Private individuals—without the sovereign power—simply could not extinguish aboriginal title, through purchase or otherwise. In *Johnson v. M'Intosh*, the question was whether grants made by Indian chiefs in 1773 and 1775 to "private individuals" conveyed title "that can be recognized in the Courts of the United States." *Johnson, supra*, 21 U.S. at 572. Chief Justice Marshall engaged in a lengthy inquiry in which he ultimately concluded, for

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[8] *See Martin v. Waddell*, 41 U.S. 367, 412 (1842). The fact that proprietary charters conveyed both the power to govern as well as the power to convey private title is also illustrated by the fact that in several cases proprietors surrendered their governmental power back to the Crown while retaining their private rights. *See Martin v. Waddell*, 41 U.S. 367, 407 (1842)(New Jersey proprietors surrendered their right to govern in 1702); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 580 (1823)(Carolina proprietor "Lord Carteret surrendered his interest in the government, but retained his title to the soil.").

the Court, that "such purchases are opposed by the soundest principles of wisdom and national policy," and that the title obtained by the plaintiffs, whether or not fairly purchased, was not valid title. *Id.* at 604. Thus, if William Penn was not the sovereign—if he was, in effect, a "private individual," then his purchases were of no greater viability then those of the plaintiffs in *Johnson v. M'Intosh,* and (apart from the effect of the Treaty of Greeneville of August 3, 1795, 7 Stat. 49) significant portions of Pennsylvania would be subject to claims of unextinguished aboriginal title by those tribes that sold to William Penn.[9] But it is far too late in the day for Petitioner to argue that William Penn and his successors lacked the sovereign authority to extinguish aboriginal title to land in colonial Pennsylvania prior to July 4, 1776. *See City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.,* 544 U.S. 197, 221 (2005) (long lapse of time and attendant dramatic changes in the character of the land precludes Indian tribe from recovering possession of land).

In sum, the court of appeals below correctly concluded, in a straightforward application of the principles of procedural waiver, that Petitioner waived its argument that the Proprietaries of Pennsylvania lacked the sovereign power to extinguish aboriginal title. In any event, it is clear that the Proprietaries of Pennsylvania had sovereign authority to extinguish aboriginal title.

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[9] Respondents argued below that the Delaware Nation gave up any claim it may otherwise have had to land in Pennsylvania in Article III of the treaty with the United States known as the Treaty of Greeneville of August 3, 1795, 7 Stat. 49. Because the district court dismissed Petitioner's claim on other grounds, it did not address the Treaty of Greeneville, nor did the court of appeals. *See* Pet. App. 9a n.8.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: October 2006

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

THE DELAWARE NATION,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION BY GOVERNOR EDWARD G. RENDELL

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QUESTIONS PRESENTED

1) Did the Court of Appeals properly find that Petitioner, the Delaware Nation, failed to make out the elements of an Indian Nonintercourse Act claim, thereby negating the need to determine whether the Act applies to land granted in fee to an individual Indian?

2) Did the Court of Appeals properly find that aboriginal title was extinguished by the Province of Pennsylvania?

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OPINIONS BELOW

The opinion of the District Court was entered on November 30, 2005 and is unreported. The opinion of the Court of Appeals was entered on May 4, 2006 and is reported at 446 F.3d 410. The Court of Appeals denied rehearing on June 15, 2006.

JURISDICTION

The judgment of the Court of Appeals was entered on May 4, 2006. A petition for rehearing was denied on June 15, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Governor Edward G. Rendell hereby opposes the Petition for Writ of Certiorari by the Delaware Nation to review the judgment of the United States Court of Appeals for the Third Circuit.

COUNTER-STATEMENT OF THE CASE

Petitioner, the Delaware Nation of Anadarko, Oklahoma (Petitioner or Tribe), a federally recognized Indian tribe, claims aboriginal right and fee title to 315 acres of land that have been in undisturbed, non-Indian ownership for more than 200 years. This 315-acre parcel, located in Easton, Pennsylvania, has passed through generations of non-Indian ownership and is presently owned by several businesses and numerous private homeowners, the County of Northampton and the Commonwealth of Pennsylvania.

The long-settled status of the land was abruptly called into question when on January 15, 2004, Petitioner filed a claim in the Federal District Court for the Eastern District of Pennsylvania, alleging that pursuant to a 1741 fee patent that granted 315 acres of land to Tundy Tatamy, in his individual capacity, the Tribe has title and right of possession to the parcel, which has been referred to throughout the proceedings as "Tatamy's Place." During the course of the District Court litigation, the Tribe also asserted an aboriginal land claim, claiming that the Walking Purchase of 1737 failed to extinguish Petitioner's aboriginal title to Tatamy's Place, and consequently, aboriginal title to approximately 1,200 square miles of eastern Pennsylvania.

On motion of the defendants, the District Court dismissed the complaint in its entirety. The court held that the Proprietaries of the Province of Pennsylvania validly extinguished aboriginal title to the land through the Walking

Purchase of 1737 and that the 1741 fee patent to Tatamy did not support the Tribe's statutory claim to Tatamy's Place.

The Third Circuit affirmed the District Court's decision, agreeing that the Walking Purchase of 1737 extinguished aboriginal title to Tatamy's Place and that the Tribe had waived its argument that the Proprietaries did not have sovereign powers to extinguish aboriginal title, an issue first raised in the Court of Appeals. The court additionally found that Tatamy's Place was not tribal land, and thus the Tribe's Nonintercourse Act claim failed.

A. Factual Allegations in the Complaint

Petitioner's complaint sets forth the following history in support of its claims. On March 4, 1681, King Charles II signed a charter in favor of William Penn and his heirs for land that would later become the Commonwealth of Pennsylvania. Complaint, ¶ 30. Pursuant to the 1681 Charter for the Province of Pennsylvania, King Charles granted Penn and his heirs title to the lands and conferred upon him "broad powers in selling or renting his lands." *Id.*, ¶ 31. The 1681 Charter, which remained in effect until the signing of the Declaration of Independence, provided the foundation for the Penns' authority over the Province of Pennsylvania. *Id.*, ¶ 34.

When Penn arrived in the Province, he sought to establish peaceful relations with the indigenous people, which included the Lenni Lenape—political predecessor of Petitioner—by purchasing the right of occupancy held by the tribes. *Id.*, ¶¶ 35, 37. "Penn recognized the aboriginal land claims of the Indians, and 'from the very beginning, he acquired Indian land through peaceful, voluntary exchange.'" *Id.*, ¶ 35. Penn brokered at least nine land transactions with the Lenni Lenape through treaty. *Id.*, ¶ 37.

Penn's sons continued Penn's approach of purchasing the lands of the Province. *Id.*, ¶ 38. In 1737, Thomas Penn, in his capacity as successor to William Penn as "Proprietarie" of

Pennsylvania, extinguished aboriginal title to approximately 1,200 square miles of land through a transaction called the Walking Purchase of 1737, alleged in the complaint to have been based on a forged deed and executed fraudulently. *Id.*, ¶¶ 38, 39. After the Walking Purchase, the Lenni Lenape petitioned King Charles II objecting to the manner in which the Walking Purchase was executed, but the Walking Purchase was not invalidated. *Id.*, ¶ 40.

The Tribe claims that it is the rightful owner of a 315-acre parcel of land included in the Walking Purchase, situated in the County of Northampton, Pennsylvania. *Id.*, ¶¶ 8, 53. This 315-acre parcel is called "Tatamy's Place," after Tundy Tatamy, an Indian to whom the Proprietaries granted the land in fee. *Id.*, ¶ 43. Tatamy was a messenger and interpreter for the Penn family, and was one of the first Indians in the Forks region to be baptized. *Id.*, ¶ 41. He apparently had a unique relationship with the Proprietaries. *Id.*, ¶ 42.

In 1733, Tatamy applied to the Proprietaries for a land grant for the 315-acre parcel. *Id.*, ¶ 43. Tatamy's application states simply, "Tattemy an Indian has improv'd a piece of Land of about 300 Acres on the forks of the Delaware—he is known to Wm Allen & Jere: Langhorne—he desires a Grant for the said Land." *Id.*

One year after the execution of the Walking Purchase, the Proprietaries granted Tatamy the land he requested as a gift. *Id.*, ¶ 44. Tatamy's 1738 deed was declared null and void, however—at Tatamy's request—in a 1741 patent. *Id.*, ¶ 41; *Id.* Exhibit F. The 1741 patent indicates that, rather than rely on the 1738 gift, Tatamy apparently determined to pay 48 pounds, 16 shillings and 5 pence for the land. *Id.* Exhibit F. Tatamy died in 1761. *Id.*, ¶ 45.

Northampton County records attached to the complaint indicate that Edward Shipper, Executor of the Estate of William Allen, conveyed Tatamy's Place to Henry and Mathias Strecher in 1760. *Id.* Exhibit G. The deed was

recorded in the Office of the Recorder of Deeds of Northampton County on March 12, 1802, and the deed states that evidence of a writing memorializing the conveyance was proved in court.[1] *Id.*

Tatamy's Place has been in non-Indian ownership for more than 200 years.

B. Proceedings Below

The District Court dismissed Petitioner's complaint in its entirety. In rejecting Petitioner's aboriginal land claim, the court explained that the sovereign had the power to extinguish aboriginal title as a matter of law, *see* Pet. App. C 35a, and could extinguish aboriginal title at will, *see* Pet. App. C 36a. After noting that "Plaintiff does not contest that Thomas Penn and the other Proprietors at the time maintained sovereign authority to extinguish aboriginal title," Pet. App. C 38a, the court found that "sweeping authority" allowed Thomas Penn to extinguish aboriginal title by whatever means, and that the Walking Purchase of 1737 established Penn's requisite intent to terminate Petitioner's aboriginal title to the land involved, which includes Tatamy's Place. Pet. App. C 39a-40a. The District Court also rejected Petitioner's claim under the Nonintercourse Act of 1799, 25 U.S.C. § 177, because aboriginal title to Tatamy's Place had been terminated by the Walking Purchase. Pet. App. C 42a-43a.

The Third Circuit affirmed the District Court's dismissal, also rejecting Petitioner's aboriginal and Nonintercourse Act claims. The court first rejected Petitioner's new argument on appeal—i.e., that Thomas Penn was not sovereign with authority to extinguish aboriginal title—explaining that

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[1] Although the court below identified the recordation of the deed as 1803, the document itself indicates that the deed was recorded in 1802. The dates are not relevant to the disposition of the issues before the Court.

absent "exceptional circumstances," the Third Circuit would not consider issues raised for the first time on appeal. The court then held that the District Court correctly determined that even had the Walking Purchase been executed fraudulently, "'[p]roof of fraud is not a material fact that would nullify Proprietory Thomas Penn's extinguishing act.'" Pet. App. A 11a-12a (citing *The Delaware Nation*, 2004 U.S. Dist. Lexis 24178, *28). The court also found that Petitioner's Nonintercourse Act claim failed, because the land had been granted in fee to Tatamy in his individual capacity, not as an agent of the Tribe, and thus the land was not tribal land, an essential element of a Nonintercourse Act claim. Pet. App. A 14a.

Neither court relied on the additional grounds argued by defendants for dismissing the claims, including Petitioner's failure to allege an unlawful conveyance, extinguishment of title by the Treaty of Greeneville of August 3, 1795, 7 Stat. 49 (1795), and laches.

REASONS FOR DENYING THE PETITION

This case raises the narrow issue of whether Petitioner has any claim to a 315-acre parcel of land located in Easton, Pennsylvania. After fully considering the arguments presented, the court below determined that Petitioner did not have such a claim for the unremarkable reason that Petitioner failed adequately to allege that that Tatamy's Place was tribal land, a required element of an Indian Nonintercourse Act violation. Both courts also determined that Petitioner's aboriginal title to the land was long ago extinguished, via the Walking Purchase of 1737.

The questions presented in the petition are both irrelevant to the ultimate outcome and inconsequential beyond the scope of this case. Petitioner asks this Court to consider whether the Nonintercourse Act applies to fee lands held by a tribe even though Petitioner is unable to establish that the land was

tribal and could not prevail regardless of the scope of the Act's application. Petitioner additionally asks this Court to consider whether it was appropriate for the Third Circuit to find waived an argument never raised by Petitioner before the District Court. Even if the Court determined that the question of waiver warranted its attention, Petitioner's argument—that the Provincial government of Pennsylvania was not sovereign and therefore was without authority to extinguish aboriginal title—is not open to reasonable debate. Were it so, title to virtually all land in Pennsylvania, and indeed to land in all other states for which similar colonial charters were executed, would be called into question.

The Third Circuit's decision in this case raises no conflict with any court of appeals or state court of last resort. Nor would this Court's resolution of the questions Petitioner presents have any bearing on Petitioner's lack of rights to the 315-acre parcel. The issues raised—the scope of the Nonintercourse Act and waiver—are not issues of sufficient importance to warrant Supreme Court review. Further review, however, would exacerbate the disruption Petitioner's claims have had on the rightful property owners of Tatamy's Place. Certiorari should be denied.

A. This Case Does Not Require Resolution of Whether the Nonintercourse Act Protects Indian Lands Held in Fee

The question of whether the Nonintercourse Act of 1799, 25 U.S.C. § 177, applies to Indian fee lands—the Petitioner's first question presented for this Court's review—was not decided by the courts below and would not be dispositive of the claims in this case. After reviewing the grants of land by the Provincial government to Tatamy, the Third Circuit determined that because Petitioner could not establish that Tatamy's Place was tribal land, a required element of a

Nonintercourse Act claim,[2] it was unnecessary to consider the scope of the Act's applicability:

> Even assuming that the Nonintercourse Act applies to land reacquired by an Indian tribe in fee after the sovereign extinguished aboriginal rights to land—an issue which appears to be unsettled, *but which is not necessary for us to decide here*—the Delaware Nation's claim must fail because it is clear that the Proprietors granted Tatamy's Place to Chief Tatamy in his individual capacity, and not as an agent of the tribe.

Pet. App. 13a-14a (emphasis added).

In failing to meet the elements of a Nonintercourse Act claim, Petitioner cannot prevail, regardless of the Court's answer to Petitioner's first question. Review of Petitioner's question would thus be hypothetical only, and would have no bearing on the Court of Appeals' decision. This Court's consideration of the issue is unwarranted.

1. *The Court of Appeals Correctly Determined that Tatamy's Place Is Not Tribal Land, a Necessary Element of a Nonintercourse Act Claim*

What Petitioner is really trying to challenge is the Third Circuit's determination that Tatamy's Place "is not 'tribal' in any sense of that word." Pet. App. 17a. However, not only has Petitioner *not* sought review of this question, but the Third Circuit's conclusion that Tatamy's Place is not tribal land is clearly correct.

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[2] To establish a *prima facie* case for violation of a Nonintercourse Act claim, a tribe must allege that: 1) it is an Indian nation or tribe, 2) the land at issue was tribal land at the time of the alleged sale to a non-Indian, 3) the United States never approved the sale of the tribal land, and 4) the trust relationship between the United States and the Indian tribe has not been terminated or abandoned. *See, e.g., Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 56 (2d Cir. 1994).

The plain language of Tatamy's 1741 Patent conveys the land to Tatamy and his heirs only, and can in no way be reasonably interpreted as a grant to the Lenni Lenape.[3] The 1741 Patent provides:

> at the Instance and request of *the said Tundy Tatamy* in consideration of his Surrendering and delivering up to be Cancelled the said former patent of the said Premises & of the Sum of Forty Eight Pounds Sixteen shillings and five Pence lawfull Money of Pennsylvania to our use *paid by the said Tundy Tatamy* . . . . We have given granted released & confirmed and by these presents for us our Heirs and Successors do grant release and *confirm unto the said Tundy Tatamy and his Heirs* the said Three hundred and fifteen Acres of Land as the same now set forth . . . .

Complaint, Exhibit F (emphasis added). The 1741 Patent indicates that the purpose of the land grant was "for Settlement and Place of Abode for [Tatamy] and his children under certain Quit rent and other reservations, Conditions and Limitations." Complaint, Exhibit F. Petitioner's complaint in fact acknowledges that the 1741 Patent granted land to Tatamy in fee. *See* Complaint, ¶ 45 ("Chief Tatamy's fee simple ownership of Tatamy's Place is documented and indisputable.") The 1741 Patent simply says nothing to suggest that the grant was to the Lenni Lenape or to Tatamy as a representative of the Tribe. On its terms, it was a grant to Tatamy, and Tatamy only. *See Felker v. Stuart Guaranty Co.*, 1998 U.S. Dist. LEXIS 17937 at *8-9 (M.D. Pa. Mar. 30, 1998) ("[T]he interpretation of a deed depends not on 'what the parties may have intended by the language but what is the meaning of the words' [used].")

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[3] Although Petitioner appears to rely in part on a 1738 patent to Tatamy for the same parcel of land, *see* Pet. at 6, the 1741 Patent expressly canceled the 1738 Patent. *See* Complaint, Exhibit F.

Despite the unambiguous language of the patent, Petitioner has persisted in arguing that the land is tribal land because the Lenni Lenape did not recognize the concept of individual ownership of land. This argument is misplaced, and the Third Circuit rightly dismissed it, explaining that "[t]he subjective state of mind of the grantee is not a consideration in interpreting public land grants." Pet. App. 16a. The court noted that, "[i]n interpreting grants of land by the government, intent of the government is a prominent consideration, and the language of the grants is to be strictly construed." Pet. App. 15a.[4]

The Third Circuit's conclusion regarding the applicability of the proprietary government's laws is completely in accord with this Court's precedent. More than 180 years ago, this Court explained that, "as grantees from the *Indians*, [non-Indians] must take according to *their* [Indian] laws of property, and as Indian subjects. The law of every dominion affects all persons and property situate within it . . . ." *Johnson v. M'Intosh*, 21 U.S. 543, 568 (1823) (emphasis in original). Conversely, as a colonial subject, Tatamy took according to the laws of the proprietary government. Petitioner's contrary interpretation does not alter the applicable law. Tatamy's Place was not tribal land. Petitioner has no rights to the land through Tatamy, and no claim under the Nonintercourse Act.

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[4] After finding the language of the 1741 Patent unambiguous, and that no resort to other sources was necessary, the Third Circuit acknowledged the minutes from a meeting of the Provincial Council in 1742, which "explicitly confirm that the Proprietors intended the land to go to Chief Tatamy alone, and not 'any other of the Delaware Indians.'" Pet. App. 15a. Whatever the merits may be of the claim that the Tribe's practice of treating aboriginal lands as held in common for Indians, that practice cannot control construction of a land patent granted by the colonial government to an individual Indian.

2. *Petitioner Failed to Allege a Conveyance, Another Critical Element of a Nonintercourse Act Claim*

The Third Circuit could have readily affirmed the District Court's decision on the basis of Petitioner's failure to allege an unlawful conveyance that is required for a Nonintercourse Act claim, as in fact Judge Roth was inclined to do.[5] A conveyance of land from an Indian to a non-Indian after the passage of the Act is an essential element of a Nonintercourse Act claim.

In fact, the only transaction Petitioner cites is the 1802 recordation of the 1800 deed that conveys Tatamy's Place from Edward Shipper, the executor of the estate of William Allen, to Henry and Mathias Strecher *in 1760*, 30 years before the enactment of the Nonintercourse Act. Complaint, ¶ 46. Further, the 1802 document Petitioner attached to its complaint indicates that the written instrument used for the 1760 conveyance "has been proved in open Court." Complaint, Exhibit G. By necessity, Tatamy was dispossessed of the land decades before the Act was passed. Thus, for almost five decades after Tatamy obtained the 1741 Patent, no Nonintercourse Act violation was even possible, and Tatamy's Place could have been legally transferred in any variety of ways.

The elements of a Nonintercourse Act claim cannot be satisfied in the absence of a conveyance, and in any case, the conveyance in this case occurred prior to the passage of the Act. Petitioner's Nonintercourse Act claim fails for this reason, as well.

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[5] The Court of Appeals noted that "Judge Roth would hold that the Nonintercourse Act claim would fail even had the land in question been tribal because the Delaware Nation failed to identify a specific land conveyance that violated the Act or to allege that the gap in the chain of title post-dates the Nonintercourse Act's enactment." Pet. App. A 17a n.15.

B. The Court Properly Determined that Petitioner Waived Its Right to Challenge the Sovereignty of Thomas Penn, But in Any Case, The Argument Has No Merit

Petitioner's second question presented—"[w]hether the Court of Appeals' finding of waiver as to Petitioner's aboriginal rights claim was improper"—likewise does not accurately characterize the question Petitioner asks this Court to address and does not warrant this Court's attention. In fact, the issue is not whether the Court of Appeals' finding of waiver with respect to Petitioner's aboriginal rights claim was improper, but rather whether its finding of waiver with respect to the issue of the Penns' *sovereignty* was improper in light of Petitioner's failure to raise the argument before the District Court.

The question of waiver, however, is commonplace, and the Third Circuit's application of the doctrine was straightforward in this case. Although Petitioner vigorously contested the efficacy of the Walking Purchase of 1737 on the ground that it was fraudulent, Petitioner did not question Thomas Penn's sovereignty or power to extinguish aboriginal title in the District Court. A finding of waiver is completely proper in such circumstances. Further, even if Petitioner had not waived the sovereignty argument, its argument would nonetheless fail. That the Proprietary governments were sovereign with the power to extinguish aboriginal title is not open to debate. A contrary decision would undermine title to most of the eastern United States.

1. *The Proprietaries of Pennsylvania Extinguished Aboriginal Title to Tatamy's Place in 1737*

The Third Circuit correctly determined that the Walking Purchase of 1737 validly extinguished aboriginal title. *See* Pet. App. 11a. The sovereign unquestionably has absolute

power to extinguish aboriginal title. *See County of Oneida v. Oneida Indian Nation of New York State*, 470 U.S. 226, 234 (1985). The means by which the sovereign extinguishes such title cannot be questioned. As this Court put it, "whether [the extinguishment] be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts." *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 347 (1941). Further, whether achieved through fraud or by other means, extinguishment occurs when the government's intent to revoke the occupancy rights of a tribe is clear. *See United States v. Gemmill*, 535 F.2d 1145, 1148 (9th Cir. 1976). Petitioner's complaint clearly evidences the intent of the Proprietaries to extinguish aboriginal title through the Walking Purchase. As the Third Circuit concluded, "[t]o now argue that Thomas Penn did not intend to extinguish aboriginal title to Tatamy's Place, which is indisputably land covered by the Walking Purchase, contradicts the very allegations in the Complaint." Pet. App. 12a-13a.

2. *The Court of Appeals Properly Determined that Petitioner Waived its Right to Raise the Argument on Appeal*

The question whether a party waived an argument is a routine issue warranting no attention by this Court. "It is well established that failure to raise an issue in the district court constitutes a waiver of the argument" on appeal. *Brenner v. Local 514, United Bhd. of Carpenters & Joiners of Am.*, 927 F.2d 1283, 1298 (3d Cir. 1991) (citations omitted).

In light of this standard, the Third Circuit's conclusion was plainly correct. As the court explained, the closest Petitioner came to raising the issue before the District Court is paragraph 31 of the complaint, which states that the Penns were "accountable directly to the King of England." Pet. App. A 10a. This paragraph, the court concluded, "fails to

put the District Court or the defendants on notice of the Delaware Nation's purported argument on appeal—that Thomas Penn lacked the sovereign authority or consent from the King of England to extinguish aboriginal title in Pennsylvania." Pet. App. A 10a.

A review of the briefs and the district court's decision supports the Third Circuit's conclusion. For example, Governor Rendell noted in his reply in the District Court that the Walking Purchase was valid *because* Thomas Penn was sovereign. As the Governor stated in footnote 1:

> The Penns' status as sovereign, with the power to extinguish aboriginal title, *is of course undisputed. See* Compl. at ¶¶ 28-37; opp. at 5-6.

Governor's Reply, p. 4 n.1 (emphasis added). Petitioner did not challenge, or even acknowledge, this statement in its Sur-Reply.[6] Had Petitioner intended to challenge Penn's sovereignty, it surely would have addressed the Governor's statement. Further, Petitioner's complaint alleges nine treaties between the Penns and the Tribe, by which Proprietaries extinguished Indian title to land in Pennsylvania. *See* Compl. ¶ 37. In not questioning the validity of those treaties, Petitioner clearly implied, at the least, that the treaties were valid. Indeed, the District Court also concluded that "Plain-

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[6] Petitioner now alleges that Governor Rendell "*raised Thomas Penn's alleged sovereign status as a factual issue, not a legal issue.*" Pet. 20 (emphasis in original). Governor Rendell did not raise Penn's sovereign status as an issue, but instead noted that no dispute existed on this topic. In addition, it is difficult to fathom how the question of whether Thomas Penn was sovereign, with authority to extinguish aboriginal title, can properly be characterized as a "factual" question. Whether Penn was sovereign, if open to debate at all, requires resort to the terms of the 1681 Charter for the Province of Pennsylvania from King Charles II to William Penn. Because the sovereign status of the Penns is based on the Charter by which King Charles II conveyed authority to William Penn and his heirs, the inquiry is clearly a legal, not factual one.

tiff does not contest that Thomas Penn and the other Proprietors of the time maintained sovereign authority to extinguish aboriginal title," Pet. App. C. 38a, and that the "Delaware Nation admits that Thomas Penn, together with other Proprietors, had sovereign authority to take the land that encompassed Tatamy's Place through the Walking Purchase . . ." Pet. App. C 34a. The Court of Appeals properly concluded that Petitioner did not challenge Penn's sovereignty until the case was on appeal, thereby waiving the argument.

Petitioner now argues that even if it waived the argument, it should nonetheless have been allowed to present the argument before the Third Circuit because prohibiting it from doing so contravenes federal Indian law and policy. Petitioner maintains that it pled that William Penn received fee title, but not the right of extinguishment. Pet. 22. This claim was not addressed by any party, or by either court below. Nor does Petitioner cite to anything in the papers below to support that it previously raised this new position.

In fact, the authorities that Petitioner cites do not support its new argument. Petitioner cites to the Indian Protection Act, 25 U.S.C. § 194, apparently as evidence of a federal policy that overcomes waiver in Indian land litigation cases. Pet. 20-21. But the Indian Protection Act does not give a tribe a free pass to raise any new argument it pleases on appeal, and no case supports such a position. The purpose of the Indian Protection Act instead is quite specific—i.e., it shifts the burden of proof in cases involving property to a non-Indian whenever an Indian makes out a presumption of title. *See* 25 U.S.C. § 194 ("[T]he burden of proof shall rest upon the white person whenever the Indian shall make out a presumption of title in himself . . . ."). It provides no direction to a federal court to disregard judicial doctrines that apply to all litigants when one litigant happens to be an Indian tribe.

In fact, none of Petitioner's arguments supports the position that a judicial determination that an argument is waived contravenes federal Indian law or policy. Petitioner seems to suggest that simply because Indian interests are involved, this Court should discard basic judicial doctrines. *See* Pet. 24. No case supports such an approach, and Petitioner cites to none. The Third Circuit's determination that Petitioner waived its challenge to Penn's sovereign status was proper.

3. *Penn's Status as Sovereign, with Authority to Extinguish Aboriginal Title, Is Not Open to Debate*

Even if it was not appropriate for the Third Circuit to have found Petitioner's sovereignty argument waived, Petitioner would nonetheless lose on the merits. There is no reasonable question that William Penn and his heirs were sovereign, with authority to terminate aboriginal title during the Colonial period. Were this not the case, title to all land acquired by William or Thomas or any other Penn—millions of acres—would be undermined. Further, because King Charles' Charter to Penn was virtually the same as other charters, the logical result of Petitioner's argument is that title to most of the eastern United States is vulnerable. Case law simply does not support Petitioner's extraordinary position.

During the colonial period, the power to extinguish aboriginal title resided in the King *or in colonial governments*, pursuant to their chartered powers. As stated by Chief Justice Marshall, "[t]he power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown, *or its grantees*. The validity of the titles given by either has never been questioned in our Courts." *Johnson v. M'Intosh*, 21 U.S. 543, 587-88 (1823) (emphasis added); *see also Martin v. Waddell*, 41 U.S. 367, 412 (1842) (explaining that the patent enabling the Duke of

York to establish a colony permitted the "duke, his heirs and assigns, [] to stand in place of the king, and administer the government according to the principles of the British constitution").

That the Charter for the Province of Pennsylvania of 1681 granted to William Penn and his heirs full authority to extinguish aboriginal title is clear:

> [W]ee have given and granted, and by these presents, for us, our heires and Successors, do Give and Grant unto the said William Penn, his Heirs and Assigns, *full and absolute power, licence and authoritie*, that he, the said William Penn, his heires and assignee, from time to time hereafter forever, att his or theire own Will and pleasure may assigne, alien, Grant, demise, or enfeoffe of the Premises soe many and such parses or parcells to him or them that shall be willing to purchase the samej as they shall thinke fitt . . . .

Complaint, Exhibit A (emphasis added). Petitioner acknowledged in its complaint that the Charter granted the Proprietaries broad authority—"full and absolute power, licence and authoritie"—to grant land within the boundaries established under the Charter. Complaint ¶ 31.

This Court has consistently found that the colonial charters empowered the proprietary governments to convey land. As this Court stated:

> The title of the crown (as representing the nation) passed to the colonists by charters which were absolute grants of the soil; and it was a first principle in colonial law, that all titles must be derived from the crown. It is true that, in some cases, purchases were made by the colonies from the Indians; but this was merely a measure of policy to prevent hostilities; and William Penn's purchase, which was the most remarkable transaction of

> this kind, was not deemed to add to the strength of his title.

Johnson, 21 U.S. at 570. *See also Howard v. Ingersoll*, 54 U.S. 381, 400 (1852) ("In proprietary governments the right of soil as well as jurisdiction was vested in the proprietors."); *Martin v. Waddell*, 41 U.S. at 412 (explaining that the charter to the Duke of York enabled him to govern according to English laws "in which the duke, his heirs and assigns, were to stand in the place of the king . . .").

The Third Circuit was correct in finding that Petitioner waived its right to contest the authority of the Penns to extinguish aboriginal title, an argument not raised in the District Court and not sufficient to resuscitate Petitioner's claims. This Court's review is unwarranted.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Delaware Nation's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

THE DELAWARE NATION,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF

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ARGUMENT

Petitioner The Delaware Nation (the "Delawares") submits this reply in further support of its Petition for a Writ of Certiorari. Opposition briefs were only filed on behalf of the Honorable Edward G. Rendell, Governor of the Commonwealth of Pennsylvania, and the Binney & Smith Defendants.[1] Those oppositions by and large avoid discussion of the important federal issues at the heart of the Delawares' petition. They summarily and wrongly dismiss as "hypothetical" and "academic" the issues raised by the petition, and instead make factual and legal arguments, which are not relevant thereto.

The important question here presented is whether the Indian Non-Intercourse Act, 25 U.S.C. § 177 (1799) (the "Non-Intercourse Act") should be interpreted to protect Indian land held in fee. Rather than addressing that issue, respondents erroneously argue that its determination is unnecessary because (1) Tatamy's Place was not "tribal land" and (2) the Delawares did not plead a "conveyance." They also misinterpret the holding of the Third Circuit Court of Appeals and mischaracterize applicable law, by erroneously asserting that the Third Circuit ruled that Tatamy's Place is not "tribal land" and wrongly contending that the Delawares were required to plead a "conveyance" to sustain their Non-Intercourse Act claims.

Governor Rendell and the Binney & Smith Defendants employ a similar tactic with respect to the issue of whether the Court of Appeals' waiver determination contravened the Indian Protection Act, 25 U.S.C. § 194 (2003). They argue that the Court of Appeals correctly ruled that the Delawares waived the right to contest Thomas Penn's alleged sovereign status on appeal, without addressing either the record or the federal statute that precludes such a ruling. They disregard the Delawares'

1. The term "Binney & Smith Defendants" refers collectively to defendants/ respondents Binney & Smith, Inc., the Follett Corporation, Carol A. Migliaccio, Nic Zawarski and Sons Developers, Inc., Daniel O. Lichtenwalner and Joan B. Lichtenwalner, all of whom are represented by the same counsel in this litigation.

repeated objections in the district court to defendants' introduction of extraneous facts in support of their dismissal motions. Respondents raise erroneous factual issues to attempt to convince this Court that Thomas Penn, not the King of England, was the sovereign of colonial Pennsylvania. Besides being inaccurate, those factual issues are inapposite to the key question of whether the district court's waiver determination violated federal Indian law and policy.

Both issues raised in the Delawares' petition are of great import to all Native Americans. Those issues should also be addressed to ensure that the Delawares' claims in this litigation are fully and fairly resolved.

I. The Non-Intercourse Act Protects Indian Tribes And Indians From The Improper Divestiture Of Indian Land Held In Fee

A. The Court of Appeals Did Not Determine That Tatamy's Place Was Not "Tribal Land"

Governor Rendell and the Binney & Smith Defendants contend that the question of whether the Non-Intercourse Act applies to Indian land held in fee would be a mere academic exercise in the context of this case. *See* Opposition Brief of Governor Rendell at 8; Binney & Smith Defendants Brief at 4. Supposedly, the Court of Appeals did not need to reach this unsettled issue because it determined that Tatamy's Place was not "tribal land." The Court of Appeals, however, made no such determination.

The Delawares' claim to Tatamy's Place is based on alternative theories: (1) that the land patents from the Proprietaries of Pennsylvania conveyed fee title to Chief Tatamy as a tribal representative, and (2) that even if the patents conveyed fee title to Chief Tatamy in his individual capacity, the Delawares are his exclusive heirs. The Court of Appeals rejected the Delawares' contention that Chief Tatamy received fee title as a tribal representative (Pet. App. 15a.), but did not consider or resolve whether the tribe owned the land as Chief

Tatamy's heir. The Court of Appeals never concluded Tatamy's Place was not tribal land. *See* Pet. App. 15a-17a.

For purposes of defendants' motions to dismiss, the Delawares' allegations that they are Chief Tatamy's heirs should have been accepted as true. Those allegations are based on the Indian law and tradition of the Delawares. This Court long ago held that the right of inheritance of Indians is controlled by the laws, usage and custom of the tribe. *Jones v. Meehan*, 175 U.S. 1, 30-32 (1899). Under the tradition of the Delawares, upon the death of an individual Indian, ownership of property does not devolve to that individual's family members, but to the tribe. *See, e.g., Journeycake v. Cherokee Nation*, 28 Ct. Cl. 281, 302 (1893), *aff'd*, 155 U.S. 196 (1894) (property does not pass to heirs specifically but to all tribe members communally).

Having determined that the patents transferred fee title to Chief Tatamy individually,[2] it was incumbent upon the Court of Appeals to resolve the Delawares' alternative claim. To do so, the Court of Appeals needed to reach the unsettled question of the applicability of the Non-Intercourse Act to fee title. That question is an important federal question, which merits this Court's review.

The import of the resolution of this issue to this case is undeniable. If the Non-Intercourse Act protects fee title, and if the Delawares are able to prove they are Chief Tatamy's heirs as they allege, then the Delawares are entitled to regain possession of Tatamy's Place and to recover damages from defendants. *See County of Oneida v. Oneida Nation of New York State,* 470 U.S. 226, 234-236 (1985). The Delawares are also entitled (1) to have the private purchases of Tatamy's Place declared null and void, *see, id.* (citing *Marsh v. Brooks*, 49 U.S. 223, 8 How. 223, 232, 12 L. Ed. 1056 (1850)); (2) to eject the current occupants, *see id.* (citing *Johnson v. McIntosh*, 21 U.S. 549 (8 Wheat.) 543, 5 L. Ed. 162 (1810)); and (3) to obtain an

2. The Delawares do not contest this aspect of the Court of Appeals' decision in their petition.

accounting of all rents, issues and profits against the trespassers on their land, *see id.* at 235-36 (citing *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941)). The resolution of this important federal issue is thus neither "academic" nor "hypothetical" to the proper resolution of the Delawares' claims.

B. The Non-Intercourse Act Does Not Require The Delawares To Allege A Conveyance To State A Valid Claim

Governor Rendell's opposition brief also attempts to divert attention from the important federal issues raised in the petition by arguing that the Delawares do not have viable claims because they do not allege an unlawful conveyance of Tatamy's Place. In making that argument, which the Court of Appeals did not resolve, the Governor seeks to impose a requirement that does not exist under well established case law.

To state a claim for a violation of the Non-Intercourse Act, a plaintiff must plead (1) it is an Indian tribe; (2) the land in question is tribal land; (3) the United States never consented to or approved of the alienation of the land in question; and (4) the trust relationship between the United States and the tribe has not been terminated or abandoned. *Golden Hill Paugussett Tribe of Indians v. Weicher*, 39 F.3d 51, 56 (2d Cir. 1994) (cites omitted). This authority, which the Governor himself cites in footnote 2 on page 8 of his opposition brief, does not require the Delawares to allege a conveyance of land.

Although the law does not require the Delawares to allege a conveyance, they nonetheless allege that they have been dispossessed of Tatamy's Place. It is beyond dispute that the Delawares are no longer in possession of Tatamy's Place. They allege in their Complaint that Chief Tatamy and his family remained in possession of that property until at least 1800. *See* Complaint at ¶ 54. They also allege that in 1802, a deed purported to convey Tatamy's Place to Harry and Mathus Strecher. *See* Complaint at ¶ 56 and Exhibit G. It is also beyond dispute that the Delawares' title to Tatamy's Place was never defeased by a

federal treaty as required by the Non-Intercourse Act. Thus, even if there were a conveyance requirement, the Delawares met that requirement in their Complaint.

II. The Court of Appeals' Conclusion That The Delawares Waived The Right To Contest The District Court's Finding That Thomas Penn Was Sovereign Contravenes Federal Law And Policy

Governor Rendell and the Binney & Smith Defendants also argue the Third Circuit Court of Appeals' waiver determination does not present a federal question worthy of this Court's review and that it is, in any event, inconsequential to the outcome of this case. *See* Opposition Brief of Governor Rendell at 12; Opposition Brief of Binney & Smith Defendants at 11. Their arguments mischaracterize both the importance of the strong federal policy in favor of Indians in land-claim litigation and the erroneous basis of the Court of Appeals' decision.

A. The Court of Appeals' Waiver Decision Contravenes Federal Law And Policy

The Court of Appeals incorrectly ruled that the Delawares waived their right to contest the district court's factual determination that Thomas Penn was sovereign. In so doing, that court violated federal Indian law and policy.

Both Governor Rendell and the Binney & Smith Defendants argue that Governor Rendell raised Thomas Penn's alleged sovereignty in a footnote in the brief in support of his dismissal motion and that the Delawares did not object to that factual conclusion. That factual contention is one of numerous "facts" that defendants-respondents improperly interjected into their seven dismissal motions. The jurisprudence surrounding Rule 12(b)(6) of the Federal Rules of Civil Procedure establishes beyond doubt that defendants must accept a complaint's allegations as true in moving to dismiss. *E.g.*, *Flohr v. Pennsylvania Power & Light Co.*, 800 F. Supp. 1252, 1254 (E.D.Pa. 1993) (citing *Estate of Baily by Oare v. York County*, 768 F.2d 503, 506 (3d Cir. 1985); *Helstoski v. Goldstein*, 552

F.2d 564, 565 (3d Cir. 1977) (*per curiam*)). Rather than respond to each improper factual issue raised by defendants, the Delawares objected (repeatedly) to the district court's consideration of all facts not contained in the Complaint. The Court of Appeals' waiver determination is, therefore, clearly erroneous.

The Court of Appeals' waiver ruling also violated federal Indian law and policy. The general rule that appellate courts will only consider issues raised in the district court is a rule of discretion, not jurisdiction. *Selected Risk Ins. v. Bruno*, 718 F.2d 67, 69 (3d Cir. 1983) (cites omitted). Appellate courts have the discretion to address substantive issues on appeal where the question is essentially legal and the record is clear and complete. *Petitioning Creditors of Melon Produce, Inc. v. Braunstein*, 112 F.3d 1232, 1236 (1st Cir. 1997). The strong federal policy in favor of Indians in land-claim litigation with non-Indians required the Court of Appeals to review this issue.

Under federal common law and Section 194 of the Indian Protection Act, once a tribe makes out a *prima facie* case of prior possession or title to the property in dispute, the non-Indians bear the burden to demonstrate otherwise. *See* 25 U.S.C. § 194 (2003); *see also Cayuga Indian Nation of New York v. Village of Union Springs*, 317 F. Supp. 2d 128, 135 (N.D.N.Y. 2004) (cites omitted). To establish aboriginal title, an Indian tribe must show that it actually, exclusively, and continuously occupied and used property for an extended period of time. *Yankton Sioux Tribe of Indians v. South Dakota*, 796 F.2d 241, 243 (8th Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987); *see also Canadian St. Regis Band of Mohawk Indians ex rel. Francis v. New York*, 278 F. Supp. 2d 313, 343 (N.D.N.Y. 2003) (Indian tribe obtains aboriginal title when it uses and occupies property to the exclusion of other Indian tribes or persons); *Seneca Nation of Indians v. New York*, 206 F. Supp. 2d 448, 503 (W.D.N.Y. 2002). In their Complaint, the Delawares alleged the requisite elements to state a *prima facie* case for aboriginal title.

The district court did not dismiss the Complaint because the Delawares failed to plead these basic elements. Rather, the district court dismissed because it found — based on allegations not contained in the Complaint — that Thomas Penn was a sovereign vested with the right to extinguish aboriginal title. Because the Delawares state a *prima facie* case for aboriginal title, defendants had the burden of production and persuasion under Section 194 to prove their defenses, including Thomas Penn's alleged sovereign status. In the context of Rule 12(b)(6), defendants cannot defeat a plaintiff's *prima facie* case by averring extraneous facts. *See, e.g., Rose v. Bartle*, 871 F.2d 331, 342 (3d Cir. 1989) (citing *Castle v. Cohen*, 840 F.2d 173, 179-80 (3d Cir. 1988) (reversible error for district court to consider extraneous facts on motion to dismiss without providing notice to the parties of conversion to a summary-judgment motion).

By failing to review the district court's dismissal of the Delawares' aboriginal claims based on Thomas Penn's alleged sovereign status, the Court of Appeals violated the above stated federal policy and law. The application of Section 194 is an important federal issue that deserves review by this Court. Correctly applied to the facts of this case, Section 194 mandates that the defendants prove at trial (not by asserting extraneous evidence in a dismissal motion) the Delawares' aboriginal rights were divested by the act of a sovereign.

B. The Determination Of Sovereignty Raises Questions Of Fact, Which Should Not Have Been Resolved Under Rule 12(b)(6)

As they did in their dismissal motions and appellate briefs, respondents make factual arguments in their opposition briefs in support of Thomas Penn's alleged sovereignty. Besides being inconsequential to the federal issues raised by the pending petition, defendants' factual arguments are simply incorrect. Further, the inaccuracy of those facts serves to highlight the necessity of the federal policy to protect Indians in land-claim litigation with non-Indians.

Governor Rendell focuses on provisions of the Charter of 1681, which granted William Penn the right to convey property. *See* Opposition Brief of Governor Rendell at 17. The plain language of the Charter makes clear that Penn received the right to convey *fee* title, also known as the right of preemption. However, the right of preemption and the right of extinguishment are separate powers and need not be held by the same entity. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 3 L. Ed. 162 (1810); *see also Oneida Indian Nation of State of New York v. County of Oneida*, 414 U.S. 661, 667 (1974).

In the Charter of 1681, William Penn received fee title along with the right "to take or purchase, their heires and assignee, in ffee [sic] simple or ffee [sic] tail or for the term of life or lives or years." Defendants mischaracterize these fee-title rights as encompassing the right of extinguishment. In doing so, defendants ignore express language in the Charter stating that the Crown is "Saving also, unto Us, Our heires and Successors, the Sovereignty of the aforesaid Countrey."

The Crown's delegation of certain self-governing powers to its colonies does not alter this result. Historian Jack P. Greene notes that notwithstanding

> the extensive self-governing powers actually exercised by the colonies under their charters, English monarchs and their advisers never wavered in their insistence that "such inferiour dominion[s]" [*i.e.*, the colonies] had to remain subordinate to the "Dominion Superiour" [*i.e.*, the Crown].

Greene, Jack P., *Peripheries and Center: Constitutional Development in the Extended Polities of the British Empire and the United States, 1697–1788*, Athens and London: The University of Georgia Press, 1986. Under the "doctrine of discovery" England, as the discovering nation, held the right of extinguishment and thus "had the exclusive authority to extinguish aboriginal title." *Seneca Nation of Indians v. New York*, 206 F.Supp. 2d 448, 505-06 (W.D. N.Y. 2002), *aff'd*, 382 F.3d 245 (2d Cir. 2004). None of the powers cited by the Binney

& Smith Defendants in their opposition briefs can be remotely construed as conveying the right of extinguishment to William Penn and his heirs. *See* Opposition Brief of Binney & Smith Defendants at 14-15.

Similarly, the Binney & Smith Defendants' argument, based on the charter for New York and New Jersey, does not support the conclusion that Thomas Penn received the right of extinguishment. *See* Opposition Brief of Binney & Smith Defendants at 15-16. The case quoted by the Binney & Smith Defendants, *Martin v. Waddell*, 41 U.S. 367, 412 (1842), does not relate to the issue of the right of extinguishment. Further, it discusses a different charter from a different time period.

Defendants' suggestion that all charters were identical and that the Crown dealt with all colonies in a uniform fashion lacks historical support. *See* Hafffenden, Philip S., *The Crown and the Colonial Charters, 1675 – 1688: Part I*, The William and Mary Quarterly, 3rd Ser., 15(3) at 308 (July, 1958) (stating that greater limitations were imposed "upon the power and authority of the proprietor [*i.e.*, William Penn] than had been employed in granting of earlier charters"). The Crown did not treat all colonies in an identical manner. Nor can it be assumed that all treaties entered into by William Penn and his heirs uniformly received approval from the King of England.

The determination of the alleged sovereignty of Thomas Penn raises questions of fact, which defendants bear the burden of proving. *See* 25 U.S.C. § 194. The Charter of 1681 clearly states that the King of England retains sovereignty over colonial Pennsylvania. Although William Penn and his heirs were not mere private land owners, as respondents point out in their opposition briefs (Governor's Opposition Brief at 16-18), none of the delegated powers include the sovereign right to extinguish aboriginal title.

These factual issues accentuate the inappropriateness of the district court's dismissal order and the Court of Appeals' waiver determination. According to the Indian Protection Act, *supra*,

defendants-respondents bear the burdens of production and persuasion on this and other issues. A trial on the merits is the proper venue to resolve such matters.

C. The Resolution Of The Delawares' Claims Does Not Put In Question All Land Obtained From Indians By William Penn

Governor Rendell and the Binney & Smith Defendants argue that if the Delawares are correct that the King of England (not William Penn and his heirs) was the sovereign of colonial Pennsylvania, then all of Pennsylvania may be subject to reclamation claims by Indian tribes. Respondents' argument ignores the fact-sensitive nature of all Indian land claims. The only facts at issue in this litigation are those surrounding the Delawares' rights to the 315 acres in Northampton County, Pennsylvania known as Tatamy's Place. The Delawares aver in their Complaint that the Proprietaries, including Thomas Penn, had the right to convey fee title (*i.e.*, the right of preemption), but not to extinguish aboriginal title. That right remained with the King of England as sovereign. Whether the King extinguished the aboriginal rights of Indian tribes as to any other land in colonial Pennsylvania, is simply not at issue in this case. Moreover, the King of England's sovereignty over colonial Pennsylvania ended with the Revolutionary War. Thus, this case does not raise the issue of whether aboriginal rights to land other than Tatamy's Place were extinguished by the sovereign after the formation of the United States of America.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Delaware Nation's Petition for a Writ of Certiorari should be granted.

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